Dec. 19, 2007

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113,
WASHINGTON, D.C. 20515

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DARYL JOSEFFER
Assistant to the Solicitor General
STEPHAN E. OESTREICHER, JR.
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Speech or Debate Clause provides a non-disclosure privilege that bars Executive Branch agents from executing a judicially issued warrant in a Member's office to search for non-legislative records of criminal activity.

PARTIES TO THE PROCEEDINGS

The United States of America is the petitioner. Representative William J. Jefferson is the respondent. Rayburn House Office Building Room 2113 is the congressional office of Representative Jefferson.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional provision involved 2
Statement 2
Reasons for granting the petition 11
A. The Speech or Debate Clause does not protect against the mere disclosure of legislative materials in the execution of a search warrant 13
B. The court of appeals' decision upsets the constitutional balance by effectively preventing any searches of congressional offices 19
C. The question presented warrants review 23
Conclusion 29
Appendix A 1a
Appendix B 40a
Appendix C 73a
Appendix D 75a

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 (1976) 16, 18
Brown & Williamson Tobacco Corp. v. *Williams*, 62 F.3d 408 (D.C. Cir. 1995) 8, 16, 28
Dibella v. *United States*, 369 U.S. 121 (1962) 8
Doe v. *McMillan*, 412 U.S. 306 (1973) 14, 15
Flanagan v. *United States*, 465 U.S. 259 (1984) 22
Forrester v. *White*, 484 U.S. 219 (1988) 14
Grand Jury Investigation, In re, 587 F.2d 589 (3d Cir. 1978) 12, 26, 27

Cases—Continued: Page

Grand Jury Proceedings, In re, 563 F.2d 577 (3d Cir. 1977) 26
Gravel v. *United States*, 408 U.S. 606 (1972) 13, 14, 15, 17, 18
Jewish War Veterans of the USA, Inc. v. *Gates*, 506 F. Supp. 2d 30 (D.D.C. 2007) 21
Lo-Ji Sales, Inc. v. *New York*, 442 U.S. 319 (1979) ... 19, 20
Michigan v. *Summers*, 452 U.S. 692 (1981) 20
Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) 17
Smith v. *Maryland*, 442 U.S. 735 (1979) 25
Tenney v. *Brandhove*, 341 U.S. 367 (1951) 15
United States v. *Brewster*, 408 U.S. 501 (1972) 11, 13, 14, 15, 19, 23
United States v. *Grubbs*, 547 U.S. 90 (2006) 19
United States v. *Helstoski*, 442 U.S. 477 (1979) 14
United States v. *Johnson*, 383 U.S. 169 (1966) 14
United States v. *Nixon*, 418 U.S. 683 (1974) 18
United States v. *Zolin*, 491 U.S. 554 (1989) 21, 23
Williamson v. *United States*, 207 U.S. 425 (1908) ... 11, 19
Zurcher v. *Stanford Daily*, 436 U.S. 547 (1978) 18

Constitution, statute and rule:

U.S. Const.:
Art. I, § 6, Cl. 1 (Speech or Debate Clause) ..... *passim*
Art. III 22
Amend. I 18

Constitution, statute and rule—Continued: Page

Amend. IV 17
Foreign Corrupt Practices Act, 18 U.S.C. 371 7
Fed. R. Crim. P. 41 ..... 5, 10, 20

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 497 F.3d 654. The opinion of the district court (App., *infra*, 40a-72a) is reported at 432 F. Supp. 2d 100.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2007. A petition for rehearing was denied on November 9, 2007 (App., *infra*, 73a-74a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. Art. I, § 6, Cl. 1.

STATEMENT

This case arises out of the government's execution in the office of Representative William J. Jefferson of a search warrant seeking unprivileged evidence of criminal activity—including bribery and other public corruption offenses—after exhausting all reasonable efforts to obtain the evidence through other means. A divided court of appeals concluded that, in the course of executing the warrant, government agents violated the Speech or Debate Clause by their incidental exposure to legislative-act materials located in Representative Jefferson's office—even though the warrant was executed under procedures designed to minimize any such exposure and even though the sole object of the warrant was *unprivileged* materials. The full court of appeals denied the government's petition for rehearing en banc by a 5-4 vote (with one judge recused).

The court's novel and expansive non-disclosure privilege incorrectly extends the Speech or Debate Clause's limited protections to search warrants, and, in so doing, casts doubt on searches of other places and a wide range of other investigatory techniques deemed essential to ferreting out corruption and criminal conduct by both Members of Congress and persons who deal with them. The court's decision warrants review by this Court because it fundamentally misinterprets a crucial structural guarantee in the Constitution. Its effect is to critically undermine the Executive Branch's ability to investigate

and prosecute corrupt activity in and affecting the Legislative Branch.

The court of appeals' error warrants review now, because its opinion controls in the seat of the Nation's government and thereby affects virtually every public corruption investigation involving the Legislative Branch—investigations that serve a vital role in protecting the integrity of our democratic government. The court of appeals' decision warrants reversal because the Speech or Debate Clause by its terms protects "Speech or Debate"; it does not protect against the disclosure of information through a criminal search warrant, which involves no "question[ing]" of a Member of Congress. U.S. Const. Art. I, § 6, Cl. 1. Only this Court can resolve this important question. Until it does so, investigations of corruption in the Nation's capital and elsewhere will be seriously and perhaps even fatally stymied.

1. In the spring of 2005, the government began investigating whether Representative Jefferson had accepted payments for undertaking official acts as a Congressman to promote business ventures in West Africa. The government also investigated whether, in furtherance of those efforts, the Congressman planned to bribe officials in Nigeria and elsewhere. See App., *infra*, 42a.

The government discovered, among other things, that Representative Jefferson's family had received an equity stake in a Nigerian company and more than $400,000 in cash in exchange for the Congressman's promotional efforts. C.A. App. 12-13. The Congressman also accepted a briefcase containing $100,000 with the understanding that he would forward it to a high-level Nigerian official. *Id.* at 15. During a search of Representative Jefferson's Washington, D.C., residence, $90,000 was found inside the Congressman's freezer. *Ibid.* Two

individuals, including one of Representative Jefferson's former staff members, have pleaded guilty to bribing and conspiring to bribe the Congressman. *Id.* at 9-10 & nn.2-3.

2. In the summer of 2005, subpoenas were issued to Representative Jefferson and his chief of staff. The government worked for months to obtain the responsive records, but none was ever produced. See App., *infra*, 29a n.7; C.A. App. 314-315. Having "exhausted all reasonable and timely alternative means of obtaining the evidence sought," App., *infra*, at 69a, the government applied to the United States District Court for the District of Columbia for a warrant to search Representative Jefferson's Capitol Hill office, *id.* at 3a. The warrant sought paper documents and computer files relating to the crimes under investigation. *Id.* at 42a. It did not seek any "legitimate legislative material that would be considered privileged under the Speech or Debate Clause." *Ibid.*; see *id.* at 13a. The district court found probable cause to believe that evidence of criminal activity would be found in Rayburn House Office Building, Room 2113, and issued the warrant. *Id.* at 44a.

On May 20, 2006, the warrant was executed in accordance with special court-approved procedures designed to limit interference with congressional activity. See App., *infra*, 4a-5a. Federal Bureau of Investigation (FBI) agents with no other role in the investigation conducted the search on a Saturday evening, outside of the office's normal business hours. See *ibid.* The non-case agents reviewed paper documents in the office for responsiveness to the warrant and were to seize only responsive records. They were forbidden thereafter from disclosing any politically sensitive or non-responsive items inadvertently seen during the search. *Id.* at 4a.

They ultimately seized two boxes of responsive paper documents. *Id.* at 5a. The agents also copied the computer hard drives in the office, without reviewing their contents, so that the computer files, along with the seized paper documents, could later be searched off-site by a filter team. See *id.* at 4a. The filter team, which consisted of persons with no other involvement in the investigation, was to review the paper documents and computer files for responsiveness and privilege and provide to the prosecution team only those documents that it found to be responsive and not potentially privileged. *Id.* at 4a-5a. Potentially privileged documents would be given to the district court for review. *Id.* at 5a.

3. Following the execution of the warrant and before the filter teams gained access to the materials, Representative Jefferson moved for the return of all of the seized materials pursuant to Federal Rule of Criminal Procedure 41. See App., *infra*, 5a-6a. In response, the government agreed to provide Representative Jefferson with copies of all of the seized materials so that he could raise speech or debate claims in the district court before *any* documents were transferred to the prosecution team. C.A. App. 132, 136. The day after Representative Jefferson filed his motion, the President directed that the materials be sealed, placed in the custody of the Solicitor General, and not reviewed by Executive Branch agents. That directive expired on July 9, 2006. App., *infra*, 6a.

On July 10, 2006, the district court denied the Congressman's Rule 41 motion. App., *infra*, 40a-72a. Because Representative Jefferson "ha[d] not been questioned" within the meaning of the Speech or Debate Clause, the court held that the Clause "was not triggered by the execution of the search warrant." *Id.* at

55a. The court reasoned that "having one's property subjected to the execution of a valid search warrant does not have a testimonial component." *Ibid.* The court also ruled that the warrant's execution "did not impermissibly interfere with Congressman Jefferson's legislative activities" because the warrant sought only evidence of criminal activity, not any materials within the "legitimate legislative sphere," and was issued by a neutral judicial officer upon a finding of probable cause to believe that evidence of criminal activity would be found in the Congressman's office. *Id.* at 58a.

The district court found "no support" for Representative Jefferson's assertion of a right to remove purportedly privileged materials before the search. App., *infra*, 58a. In the court's view, the non-case agents' "incidental review" of speech or debate material during their search for responsive documents did not undermine the Clause's purpose of preserving legislative independence, because "Congressman Jefferson may never be questioned regarding his legitimate legislative activities, [he] is immune from civil or criminal liability for those activities, and no privileged material may ever be used against him in court." *Id.* at 61a.

4. Representative Jefferson appealed and sought a stay of the district court's order. On July 28, 2006, in response to the stay motion, the court of appeals issued an order that enjoined the government from reviewing the seized materials and established an *ex parte* procedure for determining which of the seized materials, "if any," are "records of legislative acts." App., *infra*, 75a. The order directed the district court to provide Representative Jefferson with copies of "all physical documents seized," to search the copies of the computer hard drives "for the terms listed in the warrant," to provide

the Congressman with a list of responsive records, and, after the Congressman had made any privilege claims, to "make findings regarding whether the specific documents or records are legislative in nature." *Id.* at 76a. In contrast to the procedures approved by the district court, the court of appeals' order did not permit the government's filter team to assist the district court by reviewing documents over which Representative Jefferson claimed privilege and either conceding or contesting his claims in an informed manner.

After the Congressman claimed privilege on remand for almost half of the seized materials (more than 18,000 pages), see Resp. C.A. Br. 24; Gov't C.A. Br. 25 n.3, the court of appeals modified its Remand Order to grant the government access to the materials that Representative Jefferson "conceded on remand are not privileged." 11/14/06 Order 1. The district court has not yet entered any findings in response to the court of appeals' Remand Order.

5. While the appeal was pending, Representative Jefferson was charged in a 16-count indictment in the United States District Court for the Eastern District of Virginia. App., *infra*, 8a & n.1. The indictment charges Representative Jefferson with, *inter alia*, soliciting bribes; depriving citizens of honest services; violating the Foreign Corrupt Practices Act, 18 U.S.C. 371; engaging in a pattern of racketeering activity; obstructing justice; money laundering; and conspiracy. App., *infra*, 8a n.1.

6. Following expedited briefing, a divided panel of the court of appeals held that the search of the paper files in Representative Jefferson's office violated the Speech or Debate Clause and barred the contemplated

further role of the filter team in identifying legislative-act materials. App., *infra*, 1a-39a.

a. At the outset, the court of appeals observed that "neither party suggests that the return of the indictment divests the court of appeals of jurisdiction or renders this appeal moot." App., *infra*, 9a. The court then stated that it "agree[d]," explaining that the indictment did not divest it of jurisdiction under the collateral order doctrine because "[l]etting the district court's decision stand until after the Congressman's trial would * * * allow the Executive to review privileged material in violation of the Speech or Debate Clause." *Ibid.*[1]

The court then held that the Speech or Debate Clause includes an "absolute" "non-disclosure privilege." App., *infra*, 11a, 13a. Acknowledging that no decision of this Court had recognized such a privilege, the court purported to ground its holding in circuit law that addressed a subpoena seeking legislative documents. *Id.* at 11a (citing *Brown & Williamson Tobacco Corp.* v. *Williams*, 62 F.3d 408 (D.C. Cir. 1995)). Although this case involved a search warrant in a criminal investigation, not a subpoena in a civil action, the court subsumed its non-disclosure rule in the "testimonial privilege under the Speech or Debate Clause," despite acknowledging the district court's view that "a seizure of documents did not involve a testimonial element." *Id.* at 14a.

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[1] The court of appeals noted, however, that it was doubtful that the court had jurisdiction to consider, in the circumstances of this case, where no disruption to his office was alleged from lack of original documents, Representative Jefferson's claim for a remedy ordering the return of non-privileged materials. App., *infra*, 23a-24a (citing, *inter alia*, *DiBella* v. *United States*, 369 U.S. 121 (1962)). Representative Jefferson has since moved to suppress those unprivileged documents in his criminal case.

The court also recognized that "the search warrant sought only materials not protected by the Speech or Debate Clause," App., *infra*, 13a, but concluded that the search nonetheless violated the Constitution because "[i]n order to determine whether the documents were responsive to the search warrant, FBI agents had to review all of the papers in the Congressman's office, of which some surely related to legislative acts." *Id.* at 13a. The court believed that "compelled review by the Executive," *id.* at 15a, inevitably "disrupt[s] the legislative process" by exposing "frank or embarrassing statements," *id.* at 13a, thereby "chill[ing] the exchange of views with respect to legislative activity." *Id.* at 13a-14a. The court stated that the government may search a congressional office only if it first provides the Member with an "opportunity to identify and assert the privilege with respect to legislative materials *before* their compelled disclosure to Executive agents," providing no explanation as to how such an opportunity could be afforded. *Id.* at 16a (emphasis added).[2]

As a remedial matter, the court of appeals determined that Representative Jefferson is entitled to the return of privileged materials, but not to the return of unprivileged materials. App., *infra*, 22a-24a. In rejecting Representative Jefferson's claim for the return of unprivileged documents, the court reasoned that deterrence concerns were not implicated because the govern-

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[2] The court of appeals found no constitutional violation with respect to the copying of the computer hard drives, however, because no Executive agent had seen the contents of any of the files on those drives. App., *infra*, 18a. The court explained that its "Remand Order affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials [on the hard drives] to the Executive." *Ibid.*

ment had executed the search warrant in good faith and that, absent a claim of disruption to the functioning of the Representative's office, separation of powers concerns precluded the remedy sought. *Id.* at 21a-22a. Thus, the court affirmed the district court's denial of Representative Jefferson's Rule 41 motion, but left in place the conditions of the Remand Order. See *id.* at 22a-23a.

b. Judge Henderson concurred in the judgment to the extent that it "affirm[ed] the district court's denial of [the Rule 41] motion," App., *infra*, 26a, but she disagreed with the majority's finding of a constitutional violation. *Id.* at 24a-39a. Judge Henderson explained that a search does not constitute "questioning" within the meaning of the Clause because it does not require a Member "to do anything." *Id.* at 31a. Considering that "what the Clause promotes is the Member's ability to be open in debate—free from interference or restriction —rather than any secrecy right," Judge Henderson concluded that "it is the Executive Branch's evidentiary use of legislative acts, rather than its exposure to that evidence, that violates the Clause." *Id.* at 33a, 38a n.12. The majority's contrary holding, Judge Henderson explained, "would jeopardize law enforcement tools 'that have never been considered problematic,'" including searches of Members' homes or cars, as well as surveillance of Members or staffers. *Id.* at 36a-37a (quoting Gov't C.A. Br. 37).

c. By a 5-4 vote (with Judge Kavanaugh recused), the court of appeals denied the government's petition for rehearing en banc. App., *infra*, 73a-74a.

7. Representative Jefferson's trial is currently scheduled to begin on February 25, 2008, and the government does not intend to seek a delay in the hope of se-

curing additional evidence after the district court has completed its review of the Congressman's privilege claims. As explained below, the evidence seized in Representative Jefferson's office remains relevant to the government's ongoing investigation of others who may have been involved in criminal activity with Representative Jefferson.

REASONS FOR GRANTING THE PETITION

Investigations designed to ferret out congressional corruption (such as bribery) find their nerve center in the Nation's capital. Because of that fact, decisions of the United States Court of Appeals for the District of Columbia Circuit have a uniquely important role in defining the Constitution's express protection for legislators: the Speech or Debate Clause. In this case, the District of Columbia Circuit extended the reach of the Clause in a manner that cannot be reconciled with its text or purpose and that threatens to undermine, rather than reinforce, the separation of powers by making congressional offices "a sanctuary for crime." *United States* v. *Brewster*, 408 U.S. 501, 521 (1972) (quoting *Williamson* v. *United States*, 207 U.S. 425, 439 (1908)).

The divided panel construed the Speech or Debate Clause to protect against "compelled disclosure of privileged material to the Executive during execution of [a] search warrant" for a congressional office. App, *infra*, 2a. The court of appeals recognized that "[t]he Supreme Court has not spoken to the precise issue at hand" but it went on to locate a "non-disclosure" privilege in the Clause. *Id.* at 11a. That holding is fundamentally incorrect. The Clause does not confer a confidentiality privilege; to the contrary, its core protection exists for *public* acts, such as votes and floor statements, and it applies

without regard to whether a Member has attempted to preserve confidentiality; indeed, it applies even to material he has shared with the world. Thus, as the Third Circuit has held, "the privilege when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure." *In re Grand Jury Investigation*, 587 F.2d 589, 597 (1978) (*Eilberg*).

The court of appeals' absolute rule against compelled disclosure of Speech or Debate material to the Executive Branch calls vital investigative techniques into immediate and serious question with respect to public corruption probes. Although this case involves a search of a Capitol Hill office (a concededly extraordinary event), the court's decision threatens to impede searches of Members' homes, vehicles, or briefcases. Also important are the potential implications for wiretaps and pen registers directed at Members. Even using techniques designed to minimize the interception of privileged conversations, officers typically hear privileged communications or identify calls pertaining to legislative acts while seeking unprivileged evidence of crime.

This Court's guidance is needed. The District of Columbia Circuit denied rehearing en banc by a 5-4 vote, and clarification or reversal of its erroneous decision at some indefinite time in the future cannot alleviate the immediate cloud over ongoing public corruption investigations. The court of appeals' decision affects all congressional investigations because it governs investigations in the District of Columbia—the seat of our Nation's government. The decision also has a chilling effect in other jurisdictions, because the Department of Justice must weigh the need for evidence in those jurisdictions against the potential that courts will hold that investigations were tainted by the use of previously uncontrover-

sial investigative techniques. The petition for a writ of certiorari should therefore be granted.

A. The Speech Or Debate Clause Does Not Protect Against The Mere Disclosure Of Legislative Materials In The Execution Of A Search Warrant

The court of appeals fundamentally misconstrued the Speech or Debate Clause by holding that it includes an absolute non-disclosure component. The court applied that erroneous principle to prevent Executive Branch officers from coming into even incidental contact with legislative-act materials in the course of searching for unprivileged evidence of unprivileged criminal conduct. Those holdings cannot be reconciled with the text, purpose, or history of the Clause.

1. The Speech or Debate Clause provides that, "[f]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. Art. I, § 6, Cl. 1. The Clause strikes a balance within the separation of powers. It "is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." *United States* v. *Brewster*, 408 U.S. 501, 525 (1972). It is well established that the Clause does not "confer a general exemption upon Members of Congress from liability or process in criminal cases." *Gravel* v. *United States*, 408 U.S. 606, 626 (1972).

Consistent with its text, "[t]he heart of the Clause is speech or debate in either House." *Gravel*, 408 U.S. at 625. This Court has extended the Clause to preclude inquiry into all "legislative acts," in light of the Clause's purpose "to prevent intimidation of legislators by the

Executive and accountability before a possibly hostile judiciary." *Id.* at 617, 624-625. Nonetheless, "the courts have extended the privilege to matters beyond pure speech or debate * * * *only when necessary* to prevent indirect impairment of such deliberations." *Id.* at 625 (emphasis added). The Clause "does not extend beyond what is necessary to preserve the integrity of the legislative process." *Brewster*, 408 U.S. at 517; see *Forrester* v. *White*, 484 U.S. 219, 224 (1988) (courts have "been careful not to extend the scope of [the Clause] further than its purposes require"). And it does not extend to non-legislative acts like "taking a bribe," which "is, obviously, no part of the legislative process or function." *Brewster*, 408 U.S. at 526.

In keeping with that balance, the Clause gives Members three protections. First, it grants them civil and criminal immunity for legislative acts. See *Doe* v. *McMillan*, 412 U.S. 306, 311-312 (1973); *United States* v. *Johnson*, 383 U.S. 169, 184-185 (1966). Second, the Clause guarantees that a Member, or his alter ego, "may not be made to answer" questions about his legislative acts. *Gravel*, 408 U.S. at 616. Third, the Clause bars the use of legislative-act evidence against a Member. *United States* v. *Helstoski*, 442 U.S. 477, 487 (1979). Those three protections—immunity from suit, a testimonial privilege, and a prohibition on use, all limited to legislative acts—are "broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." *Brewster*, 408 U.S. at 525. Thus, while the Clause protects the legitimate prerogatives of the Legislative Branch, it does not "make Mem-

bers of Congress super-citizens, immune from criminal responsibility." *Id.* at 516.

2. The court of appeals erred by its novel recognition of a "non-disclosure privilege" that barred the Executive Branch's execution of the search warrant in this case. App., *infra*, 11a, 17a. The protections of the Speech or Debate Clause are not grounded in confidentiality and the Clause's testimonial privilege, to which the court tied its "non-disclosure privilege," does not apply to search warrants. And even if search warrants implicated the Clause in some circumstances, incidental review of legislative-act materials is not so disruptive of legislative functions as to justify the extension of the Clause to invalidate the Executive Branch's execution of a search warrant seeking non-legislative material in a criminal public corruption investigation.

a. The text of the Clause, limited to speech or debate in either House, describes activities that are generally *public* in nature. The history of the Clause explains the textual focus on public debate. The Clause's "taproots [lie] in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries," during which the Crown prosecuted Members of Parliament "for 'seditious' speeches." *Tenney* v. *Brandhove*, 341 U.S. 367, 372 (1951). The Clause, unlike traditional confidentiality privileges such as the attorney-client privilege, protects public, non-confidential activities, such as floor debates, committee hearings, votes, and the drafting of bills and committee reports. See *Gravel*, 408 U.S. at 624; *Doe*, 412 U.S. at 311-313. These are matters that the Executive Branch is free to review without violating the Clause, but may not *use* against a Member in a criminal or civil case.

Also, unlike confidentiality-based privileges, the Clause's protection of legislative materials or actions applies regardless of whether a Member has attempted to maintain their confidentiality. As Judge Henderson explained, "what the Clause promotes is the Member's ability to be open in debate—free from interference or restriction—rather than any secrecy right." App., *infra*, 33a. Neither the text nor the history of the Clause supports the court of appeals' apparent inference that the Speech or Debate Clause provides disparate protection for two classes of legislative acts, those conducted in public and those conducted under a cloak of secrecy.

Although the court of appeals located its non-disclosure privilege within the "testimonial" component of the Clause, see App., *infra*, 2a, the execution of a search warrant by law enforcement agents does not result in "testimony" by the target of the search (indeed, here, Congressman Jefferson was not even present for the search). Executing a search warrant involves no questioning and demands no testimony. See *Andresen* v. *Maryland*, 427 U.S. 463, 474 (1976) ("[T]he individual against whom [a] search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence."). Accordingly, the execution of a search warrant does not implicate the protections of the Speech or Debate Clause. App., *infra*, 31a (Henderson, J., concurring in the judgment) (execution of a search warrant is not "question[ing]" because it does "not require the [target] to do anything") (internal quotation marks omitted); see *id.* at 30a-31a (distinguishing a civil subpoena, such as that in *Brown & Williamson*).[3]

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[3] The conclusion that the precisely worded Speech or Debate Clause does not regulate search warrants would not necessarily mean that no

b. Even if a search warrant could implicate the Speech or Debate Clause, this Court has emphasized that the Clause extends beyond "speech or debate in either House * * * *only when necessary* to prevent indirect impairment of [legislative] deliberations." *Gravel*, 408 U.S. at 625 (emphasis added; internal quotation marks omitted). The execution of a search warrant by Executive Branch law enforcement agents seeking *non-legislative* materials does not impermissibly impair legislative deliberations. While the court of appeals expressed concern that "the possibility of compelled disclosure may * * * chill the exchange of views with respect to legislative activity," App., *infra*, 13a-14a, the risk of any such chill is remote. A warrant cannot issue except on a showing of probable cause to a neutral judicial officer that a congressional office contains evidence of crime. The judicial officer is fully empowered (as occurred in this case) to impose protections on the execution of a warrant to ensure that no undue interference in legislative activity occurs. The involvement of the judiciary through the warrant process therefore protects against circumstances that will unduly chill legitimate legislative conduct.

Any chill that may result from the possibility of warrant-authorized criminal investigations does not rise

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constitutional limitation applies to searches directed to Members of Congress. The separation of powers doctrine applies more generally to actions by a branch of government that "disrupt[] the proper balance between the coordinate branches [by] prevent[ing] [a different] [b]ranch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). The Fourth Amendment also protects against unreasonable searches. Courts are fully capable of protecting against searches or other Executive Branch actions that impermissibly interfere with Congress's ability to achieve its legitimate legislative objectives.

to the level of "realistic[]" impairment this Court has required for extending the Speech or Debate Clause beyond pure speech or debate in either House. *Gravel*, 408 U.S. at 618. In fact, this Court rejected a similar argument in the context of Executive privilege: "[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *United States* v. *Nixon*, 418 U.S. 683, 712 (1974); cf. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 565-566 (1978) (holding that execution of search warrant on newspaper would not unconstitutionally chill exercise of First Amendment rights).

Not even the standards applicable to traditional confidentiality-based privileges, such as the attorney-client privilege, support the court of appeals' conclusion that the Speech or Debate Clause "absolutely" bars even cursory review of legislative-act material by non-prosecution team agents who are enjoined not to reveal any non-responsive or unprivileged material they encounter. App., *infra*, 14a-15a. In *Andresen*, for example, this Court upheld a cursory examination of papers during the search of a law office "in order to determine whether they are, in fact, among those papers authorized to be seized." 427 U.S. at 482 n.11. If such incidental review is permissible in the context of a confidentiality-based privilege, it is certainly permissible in the context of a privilege designed to protect *public* speech or debate.

B. The Court Of Appeals' Decision Upsets The Constitutional Balance By Effectively Preventing Any Searches Of Congressional Offices

The court of appeals' non-disclosure privilege effectively would make congressional offices "a sanctuary for crime." *Brewster*, 408 U.S. at 521 (quoting *Williamson* v. *United States*, 207 U.S. 425, 439 (1908)). Such a holding would undermine, rather than reinforce, the separation of powers. The court of appeals asserted that, under its holding, "the Congressman's privilege under the Speech or Debate Clause" could be "asserted at the outset of a search in a manner that also protects the interests of the Executive in law enforcement." App., *infra*, 17a. But the court offered no explanation of *how* that assertion could be made, either constitutionally or practically. The court held that, at a minimum, a Member must be able to "assert the privilege with respect to legislative materials *before* their compelled disclosure to Executive agents." *Id.* at 16a (emphasis added). That means that law enforcement agents would have to depend on the target of a search, perhaps assisted by others, to segregate documents he views as privileged from those he views as unprivileged, with a court then making *ex parte* privilege determinations, *before* the government could conduct the search. That procedure ignores separation of powers concerns and practical realities concerning the risk of destruction of evidence, and introduces intractable practical problems.

To the extent that the court contemplated that non-Executive Branch officials would conduct the search, it overlooked this Court's recognition that executing a search warrant is a quintessentially "executive" function. *United States* v. *Grubbs*, 547 U.S. 90, 98 (2006) (internal quotation marks omitted); see *Lo-Ji Sales, Inc.*

v. *New York*, 442 U.S. 319, 327-328 (1979) (a "search party [is] essentially a police operation"; magistrate's participation in a search was improper because it blurred the line between the judicial role and the police officer's conduct of "the executive seizure"); Fed. R. Crim. P. 41 (demanding various tasks of "[t]he officer executing the warrant," and defining "officer" as "a government agent * * * engaged in enforcing the criminal laws"); Pet. App. 29a (Henderson, J., concurring in the judgment). To protect the integrity of evidence seized during a search and to conduct the search at all, executing agents—not the target of the search or any non-executive official—must exercise "unquestioned command of the situation." *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981).

To the extent that the court contemplated that a Member would have an untrammeled opportunity to remove *all* assertedly privileged materials before Executive Branch agents could search, its solution is unworkable. If a Member or his aides were to screen documents in the first instance, the evidentiary value of the search would be jeopardized. The Member might add fingerprints to evidence. He might rearrange documents, especially when sorting privileged from unprivileged evidence, and thereby deprive the government of the evidentiary benefit of finding documents where and as they were kept. Those concerns apply even to well-intentioned Members. And an unscrupulous Member—one who has already engaged in public corruption—might attempt to hide incriminating documents, as Representative Jefferson sought to do during an August 2005 search of his Louisiana residence. See C.A. App. 158 (affidavit of FBI agent describing Congressman's "attempt[] to conceal documents"); Indictment ¶¶ 217-

218 (charging Representative Jefferson with obstruction of justice in connection with the search). The court of appeals' decision ignores those practical realities.

Ex ante screening by a Member, followed by *ex parte* privilege determinations by a court, would also impose wholly impractical burdens on the courts. Because of the volume of legislative materials in a congressional office, the task of segregating legislative from non-legislative materials in advance of a search would be monumental—far more burdensome and disruptive than the procedures contemplated by the warrant in this case, under which FBI agents not involved in the investigation, and barred from disclosing privileged material, determined which documents were covered by the search warrant, so that only those documents had to be reviewed for privilege. See App., *infra*, 28a-29a, 32a (Henderson, J., concurring in the judgment).

Timely judicial review of the Member's privilege assertions concerning all of the documents and computer files in his office would be virtually impossible, in part because *ex parte* review places significant "burdens * * * upon the district courts," requiring them "to evaluate large evidentiary records without open adversarial guidance." *United States* v. *Zolin*, 491 U.S. 554, 571 (1989). Thus, as a district court recently observed, the *ex parte* review mandated by the decision below imposes "substantial burdens on both the Members and the courts" and "eliminates much of the efficacy of the adversarial system." *Jewish War Veterans of the USA, Inc.* v. *Gates*, 506 F. Supp. 2d 30, 62 (D.D.C. 2007).

The court of appeals asserted that its "Remand Order illustrates a streamlined approach by narrowing the number of materials the district court may be required to review." App., *infra*, 17a. In fact, that order required

the district court to review every document—more than 18,000 pages—over which Representative Jefferson claimed privilege. *Id.* at 75a-76a. Approximately a year and a half later, the district court has yet to issue any findings on any of the documents Representative Jefferson has claimed to be privileged, apparently because of the sheer volume of privilege claims and the difficulty in reviewing such claims without open adversarial guidance. Thus, nearly a year and a half after the Remand Order, the government has not yet seen *any* of the documents over which Representative Jefferson claims privilege. This delay exists, and is inherent in the court of appeals' remedy, even if, on review, the district court were to conclude that *none* of those materials contains legislative acts. Such significant delays seriously hamper criminal investigations, especially with statutes of limitations running. Cf. *Flanagan* v. *United States*, 465 U.S. 259, 264 (1984) (explaining that passage of time prejudices criminal prosecutions).

The district court's predicament would have been far worse if Representative Jefferson had been permitted to assert privilege *before* the non-case agents searched his office for paper documents, as the decision below now requires. Under that approach, the Congressman would have had to review *every* document in his office for privilege, and the district court would have had to review *every* allegedly privileged document in the Congressman's office. In contrast, under the procedures proposed by the government and specified in the search warrant approved by an Article III judge, the search team narrowed the universe of relevant documents by seizing only the documents that were responsive to the search warrant. And the government's filter team could have further narrowed the number of documents in dis-

pute by conceding privilege where appropriate, and could have provided "open adversarial guidance" about the remainder. *Zolin*, 491 U.S. at 571. The court of appeals' decision effectively prevents otherwise-practicable searches of congressional offices. It thereby infringes the constitutional value of accountability of legislators in judicial proceedings for possible criminal conduct, and undermines the balance struck by the Speech or Debate Clause. *Brewster*, 408 U.S. at 525.[4]

C. The Question Presented Warrants Review

Although this case involves the first search of a Capitol Hill office, App., *infra*, 21a, the court of appeals' decision is not limited to such searches and it casts doubt on

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[4] In the court of appeals, the government argued that the court could reject Representative Jefferson's Speech or Debate claim on the assumption that the Remand Order would remain in place, such that "the narrow issue presented is whether the incidental review of arguably protected legislative materials during the execution of the search warrant" tainted the seized materials. Gov't C.A. Br. 15; see *id.* at 35. (The government made that submission in April 2007, in anticipation of prompt completion of the privilege review in the district court, an event that, seven months later, still has not occurred.) But, while arguing that the court need not reach the issue, *e.g.*, *id.* at 18, the government also argued that the Speech or Debate Clause does not apply to search warrants, *id.* at 43-45, and that the procedures approved by the court upon issuance of the warrant and afforded by the government after the search removed any constitutional objection, *id.* at 25-26. The government also advanced as a central contention the proposition that the Speech or Debate Clause does not contain broad protections for confidentiality. *Id.* at 36-40. The court of appeals reached all of the government's broader arguments and in the process invalidated the search itself (as to paper records) and the filter-team procedures contemplated by the warrant. Thus, the court of appeals' decision has denied the government procedural rights that it enjoyed under the district court's judgment and that would have significantly expedited the privilege-review process.

a number of investigative techniques used in public corruption cases. See *id.* at 36a-37a (Henderson, J., concurring in judgment). The decision below warrants review at this time because it imposes a serious impediment to important ongoing public corruption investigations, and it disagrees with a decision of the Third Circuit.

1. The court of appeals' decision applies to the search of any "location where legislative materials were inevitably to be found." App., *infra*, 15a; see *id.* at 13a (emphasizing that the search here "must have resulted in the disclosure of legislative materials"); *id.* at 17a ("The compelled disclosure of legislative materials to FBI agents executing the search warrant was not unintentional but deliberate—a means to uncover responsive non-privileged materials."). Under that decision, traditional searches of Congressmen's district offices in their home States for documents are likely unconstitutional. The decision below may also reach beyond Members' offices to searches of their homes, vehicles, and briefcases in the District of Columbia. See *id.* at 36a (Henderson, J., concurring in judgment); cf. *id.* at 53a ("Carried to its logical conclusion, [Representative Jefferson's] argument would require a Member of Congress to be given advance notice of any search of his property, including * * * his home or car, and further that he be allowed to remove any material he deemed to be covered by the legislative privilege prior to a search."). Within the District of Columbia, for example, the United States will no longer search for documents in an office of a Member located in his home because of concerns that such a search could (under the court of appeals' decision) taint an investigation.

The court of appeals' decision also potentially jeopardizes wiretaps and pen registers directed at Members.

Officers using techniques designed to minimize the interception of privileged conversations typically hear privileged communications before determining that the relevant conversation (or portion of the conversation) is privileged. The government does not presently intend to use wiretaps against Members in the District of Columbia—the location where relevant communications are most likely to occur. In the District of Columbia, a similar analysis applies to pen registers, which do not overhear conversations, but provide valuable information by recording all of the phone numbers dialed by a telephone, including phone numbers dialed in the course of legislative business as well as in the course of possible criminal activity. Cf. *Smith* v. *Maryland*, 442 U.S. 735, 736 n.1 (1979). And the underlying principle of the case has been interpreted by some Members to preclude agents from conducting voluntary interviews with Hill staffers without the Members' consent. While the government contends that the court of appeals' decision is limited to "compelled disclosure," App., *infra*, 2a, the decision may presage a more expansive application. Thus, the court of appeals' decision is significantly impairing public-corruption investigations in the seat of our Nation's government, which are a vital means of protecting the integrity of our government.

In jurisdictions other than the District of Columbia, the court of appeals' decision also deters prosecutors from using previously uncontroversial investigative techniques for fear that those techniques will be held invalid under the rationale of the decision below, and that defendants will then argue that the entire investigation or prosecution was tainted. Law enforcement agents are thus placed on the horns of a dilemma. They could choose not to pursue potentially important evi-

dence of public corruption, and thereby risk letting serious crimes go unpunished. Or they could pursue the evidence and risk losing an important public corruption case in the event that a court later holds that the investigation was tainted by a search or wiretap that would have been considered uncontroversial before the court of appeals issued its decision in this case.

Especially because the court of appeals' decision casts such a serious cloud over important, ongoing public-corruption investigations, it warrants this Court's review. Indeed, the investigation underlying this very case has not yet concluded, because the government continues to investigate other participants in Representative Jefferson's schemes. Thus, the evidence seized in the search at issue here is relevant not only to the prosecution of Representative Jefferson, but also to the ongoing investigation and potential prosecution of other individuals. For that reason, the importance of the question presented is not limited to the government's case against Representative Jefferson and will continue regardless of whether he is convicted.

2. The need for this Court's review is bolstered by the fact that the decision below is at odds with existing circuit precedent on the scope of the Speech or Debate Clause. Unlike the District of Columbia Circuit, the Third Circuit has held that "the privilege when applied to records or third-party testimony is one of nonevidentiary use, *not of non-disclosure*." *Eilberg*, 587 F.2d at 597 (emphasis added); see *In re Grand Jury Proceedings*, 563 F.2d 577, 584 (3d Cir. 1977) ("[T]he privilege is one of nonevidentiary use rather than nondisclosure."). At issue in *Eilberg* was a grand jury subpoena, served on the Clerk of the House, seeking a Member's official telephone records. *Eilberg*, 587 F.2d at 591-592. The

records included both legislative and non-legislative information, but the Member claimed that the records were entirely immune from disclosure under the Speech or Debate Clause. *Id.* at 596. Just like Representative Jefferson, the Member urged that the Clause "protect[s] legislators from the [E]xecutive [B]ranch harassment entailed in rummaging through partially privileged records." *Ibid.* And, just like Representative Jefferson, the Member argued that the government was not entitled to view the telephone records until, at the very least, the district court considered the Member's privilege claims *ex parte*. *Ibid.*

Eilberg rejected the Member's contentions because, "[u]nlike privileges such as attorney-client, physician-patient, or priest-penitent, the purpose of which is to prevent disclosure which would tend to inhibit the development of socially desirable confidential relationships, the Speech or Debate privilege is at its core a use privilege." 587 F.2d at 596 (internal citation omitted). "[T]o the extent that the Speech or Debate Clause creates a [t]estimonial privilege as well as a [u]se immunity, it does so only for the purpose of protecting the legislator * * * from the harassment of hostile questioning. It is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy." *Id.* at 597. Thus, the court concluded, "[t]he privilege when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure." *Ibid.* For that reason, the court permitted the United States Attorney to retain and review the subpoenaed phone records—including the portions over which the Member claimed privilege—while the parties litigated the question which records were privileged. *Ibid.*

To be sure, the Third Circuit has not squarely addressed the applicability of the Speech or Debate Clause to a search of a congressional office. Nonetheless, the Third Circuit's interpretation of the Clause stands in stark contrast to the District of Columbia Circuit's, as the latter circuit has acknowledged. See *Brown & Williamson*, 62 F.3d at 420 ("We do not share the Third Circuit's conviction that democracy's 'limited toleration for secrecy' is inconsistent with an interpretation of the Speech or Debate Clause that would permit Congress to insist on the confidentiality of investigative files."); cf. App., *infra*, 37a n.12 (Henderson, J., concurring in the judgment). And the Third Circuit's willingness to permit Executive Branch officials to participate in *in camera* proceedings to segregate privileged from non-privileged materials is precisely what the court of appeals categorically forbade in this case.

The circuit courts' differing interpretations of the scope of the Speech or Debate Clause highlight the need for intervention by this Court. And the fact that the District of Columbia Circuit has improperly curtailed investigative practices permitted elsewhere amplifies the need for review. The District of Columbia is the locus of the vast majority of congressional investigations and is a potential locus of evidence in *every* congressional investigation. That fact magnifies the significance of the decision below and underscores its detrimental effects. Given the critical importance of corruption investigations in maintaining the Nation's confidence in the integrity of the Legislative Branch, and the ability of this Court alone to provide definitive guidance on the proper scope of Speech or Debate guarantees, this Court's review of the decision below is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GREGORY G. GARRE*
Acting Solicitor General
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DARYL JOSEFFER
Assistant to the Solicitor General
STEPHAN E. OESTREICHER, JR.
Attorney

DECEMBER 2007

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* The Solicitor General is recused from this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3105

UNITED STATES OF AMERICA, APPELLEE

v.

RAYBURN HOUSE OFFICE BUILDING,
ROOM 2113, WASHINGTON, D.C. 20515, APPELLANT

Argued: May 15, 2007
Decided: Aug. 3, 2007

Before: GINSBURG, Chief Judge, and HENDERSON and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROGERS.

Opinion concurring in the judgment filed by Circuit Judge HENDERSON.

ROGERS, Circuit Judge:

This is an appeal from the denial of a motion, filed pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, seeking the return of all materials seized by the Executive upon executing a search warrant for non-legislative materials in the congressional office of a sitting Member of Congress. The question on appeal is whether the procedures under which the search was conducted were sufficiently protective of the legislative

privilege created by the Speech or Debate Clause, Article I, Section 6, Clause 1 of the United States Constitution. Our precedent establishes that the testimonial privilege under the Clause extends to non-disclosure of written legislative materials. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995). Given the Department of Justice's voluntary freeze of its review of the seized materials and the procedures mandated on remand by this court in granting the Congressman's motion for emergency relief pending appeal, the imaging and keyword search of the Congressman's computer hard drives and electronic media exposed no legislative material to the Executive, and therefore did not violate the Speech or Debate Clause, but the review of the Congressman's paper files when the search was executed exposed legislative material to the Executive and accordingly violated the Clause. Whether the violation requires, as the Congressman suggests, the return of all seized items, privileged as well as non-privileged, depends upon a determination of which documents are privileged and then, as to the non-privileged documents, a balancing of the separation of powers underlying the Speech or Debate Clause and the Executive's Article II, Section 3 law enforcement interest in the seized materials. The question of whether the seized evidence must be suppressed under the Fourth Amendment is not before us.

We hold that the compelled disclosure of privileged material to the Executive during execution of the search warrant for Rayburn House Office Building Room 2113 violated the Speech or Debate Clause and that the Congressman is entitled to the return of documents that the court determines to be privileged under the Clause.

We do not, however, hold, in the absence of a claim by the Congressman that the operations of his office have been disrupted as a result of not having the original versions of the non-privileged documents, that remedying the violation also requires the return of the non-privileged documents. The Congressman has suggested no other reason why return of such documents is required pursuant to Rule 41(g) and, in any event, it is doubtful that the court has jurisdiction to entertain such arguments following the return of the indictment against him while this appeal was pending.

I.

On May 18, 2006, the Department of Justice filed an application for a search warrant for Room 2113 of the Rayburn House Office Building, the congressional office of Congressman William J. Jefferson. The attached affidavit of Special Agent Timothy R. Thibault of the Federal Bureau of Investigation ("FBI") described how the apparent victim of a fraud and bribery scheme who had come forward as a cooperating witness led to an investigation into bribery of a public official, wire fraud, bribery of a foreign official, and conspiracy to commit these crimes. The investigation included speaking with the Congressman's staff, one of whom had advised that records relevant to the investigation remained in the congressional office. Based on the investigation, the affiant concluded that there was probable cause to believe that Congressman Jefferson, acting with other targets of the investigation, had sought and in some cases already accepted financial backing and or concealed payments of cash or equity interests in business ventures located in the United States, Nigeria, and Ghana in exchange for his undertaking official acts as a Congressman while

promoting the business interests of himself and the targets. Attachments A and B, respectively, described Room 2113 and the non-legislative evidence to be seized. The affiant asserted that the Executive had exhausted all other reasonable methods to obtain these records in a timely manner.

The warrant affidavit also described "special procedures" adopted by the Justice Department prosecutors overseeing the investigation. According to the affidavit, these procedures were designed: (1) "to minimize the likelihood that any potentially politically sensitive, non-responsive items in the Office will be seized and provided to the [p]rosecution [t]eam," Thibault Aff. ¶ 136, and (2) "to identify information that may fall within the purview of the Speech or Debate Clause privilege, U.S. Const., art. I, § 6, cl. 1 or any other pertinent privilege," *id.* Essentially, the procedures called for the FBI agents conducting the search to "have no substantive role in the investigation" and upon reviewing and removing materials from Room 2113, not to reveal politically sensitive or non-responsive items "inadvertently seen . . . during the course of the search." *Id.* ¶¶ 137-38. The FBI agents were to review and seize paper documents responsive to the warrant, copy all electronic files on the hard drives or other electronic media in the Congressman's office, and then turn over the files for review by a filter team consisting of two Justice Department attorneys and an FBI agent. *Id.* ¶ 139. The filter team would determine: (1) whether any of the seized documents were not responsive to the search warrant, and return any such documents to the Congressman; and (2) whether any of the seized documents were subject to the Speech or Debate Clause privilege or other privi-

lege. Materials determined to be privileged or not responsive would be returned without dissemination to the prosecution team. Materials determined by the filter team not to be privileged would be turned over to the prosecution team, with copies to the Congressman's attorney within ten business days of the search. Materials determined by the filter team to be potentially privileged would, absent the Congressman's consent to Executive use of a potentially privileged document, be submitted to the district court for review, with a log and copy of such documents provided to the Congressman's attorney within 20 business days of the search. The filter team would make similar determinations with respect to the data on the copied computer hard drives, following an initial electronic screening by the FBI's Computer Analysis and Response Team.

The district court found probable cause for issuance of the search warrant and signed it on May 18, 2006, directing the search to occur on or before May 21 and the U.S. Capitol Police to "provide immediate access" to Room 2113. Beginning on Saturday night, May 20, more than a dozen FBI agents spent about 18 hours in Room 2113. The FBI agents reviewed every paper record and copied the hard drives on all of the computers and electronic data stored on other media in Room 2113. The FBI agents seized and carried away two boxes of documents and copies of the hard drives and electronic data. According to the brief for the Executive, the Office of the Deputy Attorney General directed an immediate freeze on any review of the seized materials. *See* Appellee's Br. at 10.

On May 24, 2006, Congressman Jefferson challenged the constitutionality of the search of his congressional

office and moved for return of the seized property pursuant to FED. R. CRIM. P. 41(g). He argued, *inter alia*, that the issuance and execution of the search warrant violated the Speech or Debate Clause and sought an order enjoining FBI and Justice Department review or inspection of the seized materials. The following day, the President of the United States directed the Attorney General, acting through the Solicitor General, to preserve and seal the records and to make sure no use was made of the materials and that no one had access to them; this directive would expire on July 9, 2006.

On July 10, 2006, the district court denied the Congressman's motion for return of the seized materials. Concluding that execution of the warrant "did not impermissibly interfere with Congressman Jefferson's legislative activities," *In re Search of the Rayburn House Office Bldg. Room No. 2113 Washington, D.C. 20515*, 432 F. Supp. 2d 100, 113 (D.D.C. 2006), the district court noted that the warrant sought only materials that were outside of the "legitimate legislative sphere," *id.* The district court rejected the Congressman's claim that he had a right to remove documents he deemed privileged before execution of the warrant, reasoning that although "some privileged material was incidentally captured by the search" and was subject to "incidental review," "the preconditions for a properly administered warrant that seeks only unprivileged material that falls outside the sphere of legitimate legislative activity are sufficient to protect against" undue Executive intrusion. *Id.* at 114. The Justice Department, therefore, could regain custody of the seized materials and resume review as of July 10, 2006. *See id.* at 119. On July 11, 2006, Congressman Jefferson filed a notice of appeal and

a motion for a stay pending appeal. According to the brief for the Executive, the Attorney General ordered the FBI to regain custody of the seized materials and imposed an immediate freeze on any review until the district court and this court considered the Congressman's request for a stay pending appeal. *See* Appellee's Br. at 13. The district court denied a stay on July 19, 2006. *See In re Search of the Rayburn House Office Bldg. Room No. 2113, Washington, D.C. 20515*, 434 F. Supp. 2d 3 (D.D.C. 2006).

This court, upon consideration of the Congressman's emergency motion for a stay pending appeal filed on July 20, 2006, enjoined the United States, acting through the Executive, from resuming its review of the seized materials. *See* Order of July 25, 2006. Three days later, the court remanded the record to the district court to make findings regarding "which, if any, documents (physical or electronic) removed . . . from [the] Congressman['s] . . . office pursuant to a search warrant executed on May 20, 2006, are records of legislative acts." Order of July 28, 2006 ("Remand Order"). The court instructed the district court to: (1) copy and provide the copies of all the seized documents to the Congressman; (2) "using the copies of computer files made by [the Executive], search for the terms listed in the warrant, and provide a list of responsive records to Congressman Jefferson"; (3) provide the Congressman an opportunity to review the records and, within two days, to submit, *ex parte*, any claims that specific documents are legislative in nature; and (4) "review *in camera* any specific documents or records identified as legislative and make findings regarding whether the specific documents or records are legislative in nature." Remand

Order at 1. In the meantime, the court enjoined the Executive from reviewing any of the seized documents pending further order of this court. Subsequently, the court allowed the Executive to review seized materials that the Congressman "has conceded on remand are not privileged under the Speech or Debate Clause." Order of Nov. 14, 2006. The court ordered expedition of this appeal, *id.*, and oral argument was heard on May 15, 2007.

On June 4, 2007, the grand jury returned a sixteen-count indictment against Congressman Jefferson in the Eastern District of Virginia. *United States v. Jefferson*, No. 07-0209 (E.D. Va. indictment filed June 4, 2007). The indictment included charges of racketeering, solicitation of (and conspiracy to solicit) bribes, money laundering, wire fraud, and obstruction of justice.[1] Trial is scheduled to begin with jury selection in January 2008. This court's jurisdiction of the Congressman's appeal rests on the collateral order doctrine. *See United States v. Rostenkowski*, 59 F.3d 1291, 1296-1300 (D.C. Cir. 1995). Neither party suggests that the return of the indictment divests this court of jurisdiction or renders this appeal moot or urges that the court not proceed to

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[1] The indictment charged: Count 1, Conspiracy to Solicit Bribes by a Public Official, Deprive Citizens of Honest Services by Wire Fraud, and Violate the Foreign Corrupt Practices Act, 18 U.S.C. § 371; Count 2, Conspiracy to Solicit Bribes by a Public Official, Deprive Citizens of Honest Services by Wire Fraud, *id.* § 371; Counts 3 & 4, Solicitation of Bribes by a Public Official, *id.* § 201(b)(2)(A); Counts 5 to 10, Scheme to Deprive Citizens of Honest Services by Wire Fraud, *id.* §§ 1343 and 1346; Count 11, Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2(a); Counts 12-14, Money Laundering, 18 U.S.C. § 1957; Count 15, Obstruction of Justice, 18 U.S.C. § 1512(c)(1); Count 16, Racketeer Influenced Corrupt Organization, Pattern of Racketeering Activity (RICO), *id.* § 1962(c).

decide this appeal.[2] *Cf. In re 3021 6th Ave. N., Billings, MT v. United States*, 237 F.3d 1039, 1041 (9th Cir. 2001). We agree, for the Executive retains in its possession seized materials, including complete copies of every computer hard drive in Room 2113, which contain legislative material.[3] *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); *see also Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 74 F.3d 1308, 1311 (D.C. Cir.), vacated on other grounds, 519 U.S. 1, 117 S. Ct. 378, 136 L. Ed. 2d 1 (1996). Letting the district court's decision stand until after the Congressman's trial would, if the Congressman is correct, allow the Executive to review privileged material in violation of the Speech or Debate Clause.

II.

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. CONST. art. I, § 6, cl. 1. The version of the Clause adopted by the Founders closely resembles the language adopted in the English Bill of Rights of 1689, which came out of the long struggle for governmental supremacy between the English monarchs and the Parliament, during which the criminal and civil law were used to intimidate legislators. By the time of the Constitutional Convention, the privilege embodied in the Speech or Debate Clause was "recognized as an important protection of

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[2] *See* Letter from Roy W. McLeese III, Assistant United States Attorney, to Mark J. Langer, Clerk (June 7, 2007); Letter from Robert P. Trout, Esquire, to Mark J. Langer, Clerk (June 11, 2007).

[3] Letter from Robert P. Trout, *supra* note 2.

the independence and integrity of the legislature," *United States v. Johnson*, 383 U.S. 169, 178, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966), and was to serve as a protection against possible "prosecution by an unfriendly executive and conviction by a hostile judiciary," *id.* at 179.

In defining the protections afforded by the Clause, the Supreme Court has limited the scope to conduct that is an integral part of "the due functioning of the legislative process." *United States v. Brewster*, 408 U.S. 501, 513, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972). The Congressman does not dispute that congressional offices are subject to the operation of the Fourth Amendment and thus subject to a search pursuant to a search warrant issued by the federal district court. The Executive acknowledges, in connection with the execution of a search warrant, that there is a role for a Member of Congress to play in exercising the Member's rights under the Speech or Debate Clause. The parties disagree on precisely when that should occur and what effect any violation of the Member's Speech or Debate rights should have. The Congressman contends that the exercise of his privilege under the Clause must precede the disclosure of the contents of his congressional office to agents of the Executive and that any violation of the privilege requires return of all of the seized materials. The Executive offers that the special procedures described in the warrant affidavit "are more than sufficient to protect Rep[resentative] Jefferson's rights . . . under the Clause," Appellee's Br. at 15-16, and that any violation of the privilege does not deprive the Executive of the right to retain all non-privileged materials within the scope of the search warrant.

The Supreme Court has not spoken to the precise issue at hand. May 20-21, 2006 was the first time a sitting Member's congressional office has been searched by the Executive. The Court has made clear, however, in the context of a grand jury investigation, that "[t]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel v. United States*, 408 U.S. 606, 616, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972). Although in *Gravel* the Court held that the Clause embraces a testimonial privilege, *id.* at 616, to date the Court has not spoken on whether the privilege conferred by the Clause includes a non-disclosure privilege. However, this court has.

Beginning with the observation that the prohibition in the Speech or Debate Clause is "deceptively simple," this court held in *Brown & Williamson*, 62 F.3d at 415, that the Clause includes a non-disclosure privilege, *id.* at 420. Noting that the purpose of the Speech or Debate Clause is "'to insure that the legislative function the Constitution allocates to Congress may be performed independently,' without regard to the distractions of private civil litigation or the periods of criminal prosecution," *id.* at 415 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975)), the court rejected the view that the testimonial immunity of the Speech or Debate Clause applies only when Members or their aides are personally questioned:

> Documentary evidence can certainly be as revealing as oral communications—even if only indirectly when, as here, the documents in question . . . do not detail specific congressional actions. But indica-

> tions as to what Congress is looking at provide clues as to what Congress is doing, or might be about to do—and this is true whether or not the documents are sought for the purpose of inquiring into (or frustrating) legislative conduct or to advance some other goals. . . . We do not share the Third Circuit's conviction that democracy's "limited toleration for secrecy" is inconsistent with an interpretation of the Speech or Debate Clause that would permit Congress to insist on the confidentiality of investigative files.

Id. at 420. As "[d]iscovery procedures can prove just as intrusive" as naming Members or their staffs as parties to a suit, *id.* at 418 (italics omitted), the court held that "[a] party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen," *id.* at 421. Further, the court noted, citing *Eastland*, 421 U.S. at 509, that when the privilege applies it is absolute. *Brown & Williamson*, 62 F.3d at 416. As such, "if the touchstone is interference with legislative activities," then "the nature of the use to which documents will be put—testimonial or evidentiary—is immaterial." *Id.* at 421. In the same vein, the court indicated that the degree of disruption caused by probing into legislative acts is immaterial, *id.* at 419; *see also MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 860 (D.C. Cir. 1988).

Thus, our opinion in *Brown & Williamson* makes clear that a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put. *See* 62 F.3d at 419. The bar on com-

pelled disclosure is absolute, *see Eastland*, 421 U.S. at 503, and there is no reason to believe that the bar does not apply in the criminal as well as the civil context. The Executive does not argue otherwise; the search warrant sought only materials not protected by the Speech or Debate Clause. Although *Brown & Williamson* involved civil litigation and the documents being sought were legislative in nature, the court's discussion of the Speech or Debate Clause was more profound and repeatedly referred to the functioning of the Clause in criminal proceedings. *See, e.g., Brown & Williamson*, 62 F.3d at 416.[4]

The search of Congressman Jefferson's office must have resulted in the disclosure of legislative materials to agents of the Executive. Indeed, the application accompanying the warrant contemplated it. In order to determine whether the documents were responsive to the search warrant, FBI agents had to review all of the papers in the Congressman's office, of which some surely related to legislative acts. This compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Member of Congress and the Member's staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to

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[4] The court also acknowledged that the Supreme Court's "sensitivities" in *Gravel*, 408 U.S. at 614, 92 S. Ct. 2614, "to the existence of criminal proceedings against persons other than Members of Congress at least suggest that the testimonial privilege might be less stringently applied when inconsistent with a sovereign interest." *Brown & Williamson*, 62 F.3d at 419-20. As we note below, this possibility is not applicable to the present case.

legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process.

The Executive and the district court appear to have proceeded on the premise that the scope of the privilege narrows when a search warrant is at issue. In the district court's view, the Speech or Debate Clause was not implicated by execution of the search warrant because a seizure of documents did not involve a testimonial element. *See Rayburn*, 432 F. Supp. 2d at 111-12. Both also emphasized that the search warrant sought only non-privileged materials as a basis for distinguishing *Brown & Williamson*, and looked to the procedural protections afforded by the issuance of a valid search warrant available only in criminal investigations as eliminating any threat to Congress's capacity to function effectively. Our concurring colleague takes much the same approach, failing to distinguish between the lawfulness of searching a congressional office pursuant to a search warrant and the lawfulness of the manner in which the search is executed in view of the protections afforded against compelled disclosure of legislative materials by the Speech or Debate Clause. The considerations voiced by our concurring colleague and the district court may demonstrate good faith by the Executive, but they fail to adhere to this court's interpretation of the scope of the testimonial privilege under the Speech or Debate Clause, much less to the Supreme Court's interpretation of what constitutes core legislative activities, *see Brewster*, 408 U.S. at 526, and the history of the Clause. While the Executive characterizes what occurred as the "incidental review of arguably protected legislative materials," Appellee's Br. at 15, it does not

deny that compelled review by the Executive occurred, nor that it occurred in a location where legislative materials were inevitably to be found, nor that some impairment of legislative deliberations occurred.

Reliance by the Executive and the district court on *Zurcher v. Stanford Daily*, 436 U.S. 547, 566-67, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978), is misplaced. There, the Supreme Court rejected the argument that the First Amendment imposed a bar to third-party search warrants absent a prior opportunity by the press to litigate the state's entitlement to the material before it is turned over or seized. However, in *Zurcher*, the Supreme Court did not address whether a particular search was invalid because it was unconstitutional in its design and implementation; nor did it involve a privilege that absolutely shields records from non-voluntary disclosure. Contrary to the Executive's understanding on appeal, it is incorrect to suggest that Congressman Jefferson's position is that he was entitled to prior notice of the search warrant before its execution, without regard to the Executive's interests in law enforcement. The Congressman makes clear in his brief that he is not suggesting advance notice is required by the Constitution before Executive agents arrive at his office. *See* Appellant's Br. at 36. Rather he contends legislative and executive interests can be accommodated without such notice, as urged, for example by the Deputy Counsel to the House of Representatives: "We're not contemplating advance notice to the [M]ember to go into his office to search his documents before anyone shows up," but rather that "[t]he Capitol [P]olice would seal the office so that nothing would go out of that office and then the search would take place with the [M]ember there." Tr. of Hr'g, June

16, 2006, at 35; *see* Appellant's Br. at 36. Neither does the Congressman maintain that the Speech or Debate Clause protects unprivileged evidence of unprivileged criminal conduct. Nor has the Congressman argued that his assertions of privilege could not be judicially reviewed, only that the warrant procedures in this case were flawed because they afforded him no opportunity to assert the privilege before the Executive scoured his records. *See* Appellant's Br. at 37.

The special procedures outlined in the warrant affidavit would not have avoided the violation of the Speech or Debate Clause because they denied the Congressman any opportunity to identify and assert the privilege with respect to legislative materials before their compelled disclosure to Executive agents. Indeed, the Congressman, his attorney, and counsel for the House of Representatives were denied entry into Room 2113 once the FBI arrived. The special procedures described in the warrant affidavit called for review by FBI agents and the several members of the Justice Department filter team before the Congressman would be afforded an opportunity to identify potentially privileged materials. This procedure is significantly different even from those the Executive has on occasion afforded to other privileges not protected in the Constitution; for example, in *United States v. Search of Law Office*, 341 F.3d 404, 407 (5th Cir. 2003), the privilege holder was allowed an opportunity to identify documents protected under the attorney-client privilege at the point the search was completed. Although the Supreme Court in *Weatherford v. Bursey*, 429 U.S. 545, 558, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977), distinguished between the receipt of privileged information by an agent of the Executive and by

the prosecution team in the context of a civil rights claim based on a Sixth Amendment violation, the nature of the considerations presented by a violation of the Speech or Debate Clause is different. If the testimonial privilege under the Clause is absolute and there is no distinction between oral and written materials within the legislative sphere, then the non-disclosure privilege for written materials described in *Brown & Williamson*, 62 F.3d at 421, is also absolute, and thus admits of no balancing, *cf. United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *Moody v. IRS*, 654 F.2d 795, 799 (D.C. Cir. 1981). The compelled disclosure of legislative materials to FBI agents executing the search warrant was not unintentional but deliberate—a means to uncover responsive non-privileged materials.

There would appear to be no reason why the Congressman's privilege under the Speech or Debate Clause cannot be asserted at the outset of a search in a manner that also protects the interests of the Executive in law enforcement. To the extent the Executive expresses concern about the burdens placed upon the district court and attendant delay during judicial review of seized materials, the Remand Order illustrates a streamlined approach by narrowing the number of materials the district court may be required to review. The historical record utterly devoid of Executive searches of congressional offices suggests the imposition of such a burden will be, at most, infrequent. Regardless of whether the accommodation is by initially sealing the office to be searched before the Member is afforded an opportunity to identify potentially privileged legislative materials prior to any review by Executive agents or by some other means, seriatim initial reviews by agents of the

Executive of a sitting Member's congressional office are inconsistent with the privilege under the Clause. How that accommodation is to be achieved is best determined by the legislative and executive branches in the first instance.[5] Although the court has acknowledged, where it is not a Member who is subject to criminal proceedings, that the privilege might be less stringently applied when inconsistent with a sovereign interest, *see Brown & Williamson*, 62 F.3d at 419-20; *supra* note 4, this observation has no bearing here and is relevant, if at all, to the question of remedy for a violation, not the determination of whether a violation has occurred.

Accordingly, we hold that a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause. The Executive's search of the Congressman's paper files therefore violated the Clause, but its copying of computer hard drives and other electronic media is constitutionally permissible because the Remand Order affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive; the Executive advises, *see* Appellee's Br. at 14, 62-63, that no FBI agent or other Executive agent has seen any electronic document that, upon adjudication of the Congressman's claim of privilege, may be determined by the district court to be privileged legislative material.

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[5] *See* Amicus Br. of Hon. Abner J. Mikva at 18; Amicus Br. of Scott Palmer, Elliot S. Berke, and Reid Stuntz, and Philip Kiko (former senior congressional staffers) at 26. *Compare* Amicus Br. of Thomas S. Foley, Newt Gingrich and Robert H. Michel (former Speakers of the U.S. House of Representatives) at 27-30 (suggesting specific alternative procedures for search of congressional offices); Amicus Br. of Stanley M. Brand et al. (former counsel to the U.S. House of Representatives and the Senate and scholars) at 28-29 (same).

III.

The question remains what the appropriate remedy is under Rule 41(g) for a violation of the Speech or Debate Clause. The 1989 Advisory Committee Notes to Rule 41(e)[6] state:

> No standard is set forth . . . to govern the determination of whether property should be returned to a person aggrieved either by an unlawful seizure or by deprivation of the property. . . . If the United States has a need for the property in an investigation or prosecution, its retention of the property generally is reasonable. But, if the United States' *legitimate interests* can be satisfied even if the property is returned, continued retention of the property would become unreasonable.

(emphasis added). Our task is to determine how to reconcile the scope of the protection that is afforded to a Member of Congress under the Speech or Debate Clause with the Executive's Article II responsibilities for law enforcement.

Clearly a remedy in this case must show particular respect to the fact that the Speech or Debate Clause "reinforces the separation of powers and protects legislative independence." *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 8 (D.C. Cir. 2006) (en banc) (collecting cases). Congressman Jefferson argued in the district court that he has suffered irreparable harm with no adequate remedy available at law because the violation of his constitutional rights cannot be vindicated by an

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[6] As a result of the 2002 Amendments, Rule 41(e) now appears with minor stylistic changes as Rule 41(g). *United States v. Albinson*, 356 F.3d 278, 279 n.1 (3d Cir. 2004).

action at law or damages or any other traditional relief.[7] On appeal, however, the Congressman makes no claim that the functioning of his office has been impaired by loss of access to the original versions of the seized documents; the Remand Order directed that he be given copies of all seized documents. Remand Order of July 28, 2007. Perhaps more to the point, however, he contends that complete return of all seized materials is the only remedy that vindicates the separation of powers principles underlying the Speech or Debate Clause and serves as an appropriate deterrent to future violations.

Although the search of Congressman Jefferson's paper files violated the Speech or Debate Clause, his argument does not support granting the relief that he seeks, namely the return of all seized documents, including copies, whether privileged or not. Taking his assertions in reverse order, such relief is unnecessary to deter future unconstitutional acts by the Executive. There is no indication that the Executive did not act based on a good faith interpretation of the law, as reflected in the district court's prior approval and later defense of the special procedures set forth in the warrant affidavit. While the Fourth Amendment issue is not before us, the Supreme Court's instruction in *United States v. Leon*, 468 U.S.

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[7] *See In re Search of Law Office*, 341 F.3d at 414 & n.49 (holding that district court must find "at the very least, a substantial showing of irreparable harm" in order to suppress seized evidence under Rule 41(e), citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 359-60, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977)); *Ramsden v. United States*, 2 F.3d 322, 325 (9th Cir. 1993) ("agree[ing] with the Fifth, Eighth, and Tenth Circuits that a district court must determine whether a movant will suffer irreparable injury when considering whether to reach the merits of a preindictment Rule 41(e) motion").

897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), is relevant to the extent the Congressman invokes deterrence as a rationale for the remedy he seeks under Rule 41(g). In addressing application of the exclusionary rule in the context of the Fourth Amendment, the Supreme Court pointed out in *Leon* that "[p]articularly when law enforcement officers have acted in objective good faith [on a warrant issued by a neutral magistrate] or their transgressions have been minor," the possible benefit from exclusion, in terms of future deterrence, is limited, 468 U.S. at 907-08, 104 S. Ct. 3405. Additionally, with respect to concern about future actions by the Executive, this is the only time in this Nation's history that the Executive has searched the office of a sitting Member of Congress. Our holding regarding the compelled disclosure of privileged documents to agents of the Executive during the search makes clear that the special procedures described in the warrant affidavit are insufficient to protect the privilege under the Speech or Debate Clause. This too should ameliorate concerns about deterrence.

At the same time, the remedy must give effect not only to the separation of powers underlying the Speech or Debate Clause but also to the sovereign's interest under Article II, Section 3 in law enforcement. The following principles govern our conclusion. The Speech or Debate Clause protects against the compelled disclosure of privileged documents to agents of the Executive, but not the disclosure of non-privileged materials. Its "shield does not extend beyond what is necessary to preserve the integrity of the legislative process," *Brewster*, 408 U.S. at 517, and it "does not prohibit inquiry into illegal conduct simply because it has some nexus to leg-

islative functions," *id.* at 528. This particular search needlessly disrupted the functioning of the Congressman's office by allowing agents of the Executive to view legislative materials without the Congressman's consent, even though a search of a congressional office is not prohibited *per se.* Still, the Congressman makes no claim in his brief, much less any showing, that the functioning of his office has been disrupted as a result of not having possession of the original versions of the non-privileged seized materials. Most important, to construe the Speech or Debate Clause as providing an absolute privilege against a seizure of non-privileged materials essential to the Executive's enforcement of criminal statutes pursuant to Article II, Section 3 on no more than a generalized claim that the separation of powers demands no less would, as the Supreme Court has observed, albeit as to a qualified privilege, "upset the constitutional balance of 'a workable government.'" *Nixon,* 418 U.S. at 707, 94 S. Ct. 3090 (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring)). The Supreme Court has instructed that the Clause is to be applied "in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *Brewster,* 408 U.S. at 508, 92 S. Ct. 2531; *see Fields,* 459 F.3d at 9.

Applying these principles, we conclude that the Congressman is entitled, as the district court may in the first instance determine pursuant to the Remand Order, to the return of all materials (including copies) that are privileged legislative materials under the Speech or Debate Clause. Where the Clause applies its protection is absolute. For the reasons stated, absent any claim of

disruption of the congressional office by reason of lack of original versions, it is unnecessary to order the return of non-privileged materials as a further remedy for the violation of the Clause. The Congressman has suggested no other reason why return of the non-privileged documents is required pursuant to Rule 41(g), and, in any event, it is doubtful that the court has jurisdiction to entertain such arguments following the return of the indictment. Unlike the Congressman's request for the return of legislative materials protected by the Speech or Debate Clause, the further claim for the return of all non-privileged materials is not independent of the criminal prosecution against him, especially if the legality of the search will be a critical issue in the criminal trial. *See In re 3021 6th Ave. N.*, 237 F.3d at 1041 (citing *DiBella v. United States*, 369 U.S. 121, 131-32, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962)); *In re Search of the Premises Known as 6455 South Yosemite*, 897 F.2d 1549, 1554-56 (10th Cir. 1990); *United States v. Mid-States Exchange*, 815 F.2d 1227, 1228 (8th Cir. 1987) (per curiam). We agree with the Ninth Circuit's holding that the 1989 amendment to Rule 41, eliminating the coupling of a motion for the return of property under Rule 41 and a motion to exclude evidence at trial, FED. R. CRIM. P. 41(g), does not affect *DiBella*'s controlling force, which balanced the individual and government interests and their relationship to trial delays or disruptions, 369 U.S. at 124, 126, 129, 82 S. Ct. 654; *see, e.g., In re 3021 6th Ave. N.*, 237 F.3d at 1041. *See generally* 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3918.4 (2d ed. 1992). Although the Congressman's further request is solely for the return of property, his Rule 41(g) motion is "tied to a criminal prosecution *in esse* against the

movant," *DiBella*, 369 U.S. at 132, 82 S. Ct. 654; it is of no moment that the indictment was filed in another district, *id*. The fact that the prosecution has commenced "will afford . . . adequate opportunity to challenge the constitutionality of the search of his . . . office," and hence "there is now no danger that the [Executive] might retain [the Congressman's] property indefinitely without any opportunity . . . to assert on appeal his right to possession"; hence there is "no basis upon which to grant piecemeal review of [his further] claim [for non-privileged materials]." *United States v. Search Warrant for 405 N. Wabash, Suite 3109*, 736 F.2d 1174, 1176 (7th Cir. 1984).

Accordingly, we hold that the Congressman is entitled to the return of all legislative materials (originals and copies) that are protected by the Speech or Debate Clause seized from Rayburn House Office Building Room 2113 on May 20-21, 2006. Further, as contemplated by the warrant affidavit, *see* Thibault Aff. ¶¶ 137-38, the FBI agents who executed the search warrant shall continue to be barred from disclosing the contents of any privileged or "politically sensitive and non-responsive items," *id*. ¶ 138, and they shall not be involved in the pending prosecution or other charges arising from the investigation described in the warrant affidavit other than as regards responsiveness, *id*.

KAREN LECRAFT HENDERSON, Circuit Judge, concurring in the judgment:

When all of the brush is cleared away, this case presents a simple question: can Executive Branch personnel—here, special agents of the Federal Bureau of Investigation—execute a search warrant directed to the

congressional office of a Member of the Congress (Member) without doing violence to the Speech or Debate Clause (Clause) set forth in Article I, Section 6, Clause 1 of the United States Constitution?[1] The limited United States Supreme Court precedent regarding the applicability of the Clause in the criminal context makes one thing clear—the Clause "does not purport to confer a general exemption upon Members of Congress from liability *or process* in criminal cases. Quite the contrary is true." *Gravel v. United States*, 408 U.S. 606, 626, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972) (emphasis added). It appears that neither the Supreme Court nor any inferior court has addressed the question as I view it and the single holding from our court on which the majority almost exclusively relies to answer the question in the negative decides only the Clause's applicability to a *civil* subpoena obtained by *private* parties who sought certain files in the possession of a congressional subcommittee. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (Clause barred enforcement of subpoenas *duces tecum* issued to two members of House Subcommittee on Health and Environment); Maj. Op. at 659-61 (relying on *Brown & Williamson* because "[t]he Supreme Court has not spoken").[2] But *Brown &*

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[1] The Clause provides that "for any *Speech or Debate* in either House" "[t]he Senators and Representatives" "shall not be *questioned* in any other Place." U.S. Const. Art. I, § 6, cl. 1 (emphases added).

[2] Contrary to the majority's assertion that "[t]he Executive does not argue" that the Clause's "bar on compelled disclosure" "does not apply in the criminal as well as the civil context," Maj. Op. at 660, the government expressly argues that "[t]he execution of a search warrant . . . is far removed from the core concerns animating the Clause," Appellee's Br. at 44, and therefore "the protections of the Clause . . . cannot extend to precluding search warrants," *id.* at 45. With respect to our

Williamson's brief comments regarding the Clause in the criminal context—which comments importantly acknowledge the Clause's less categorical scope in that context[3]—remain dicta no matter how "profound." Maj. Op. at 661. I believe the question can be directly answered "yes" without resort to dicta or any other indirect support or theory. Accordingly, while I concur in the judgment which affirms the district court's denial of Representative William J. Jefferson's (Rep. Jefferson) Rule 41(g) motion, I do not agree with the majority's reasoning and distance myself from much of its dicta.

The Supreme Court has made clear that the two elements of the privilege—"Speech or Debate" and "question[ing]"—must "be read broadly to effectuate its purposes." *United States v. Johnson*, 383 U.S. 169, 180, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966). As our court has noted, the "touchstone" of the Clause "is interference with legislative activities," *see Brown & Williamson*, 62 F.3d at 421; the Clause is therefore "designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves'" for their legislative actions, *Helstoski v. Meanor*, 442 U.S. 500, 508, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S. Ct. 1425, 18 L. Ed. 2d 577 (1967)); *see also Johnson*, 383 U.S. at 179, 86 S. Ct. 749 (Clause "pro-

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precedent, moreover, the government asserts that "*Brown & Williamson* itself distinguished between civil subpoenas and criminal proceedings, and limited its holding to the former." *Id.* at 47. Finally, the government repeatedly emphasizes the consequences for law enforcement if a non-disclosure rule is recognized in the criminal context. *See id.* at 37-38.

[3] *See infra* pp. 659-60.

tect[s] [the legislature] against possible prosecution by an unfriendly executive and conviction by a hostile judiciary"). Still, the "speech or debate privilege was designed to preserve legislative *independence*, not supremacy." *United States v. Brewster*, 408 U.S. 501, 508, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972) (emphasis added).

There is no dispute that the *issuance* of the search warrant for Rep. Jefferson's congressional office does not violate the Clause. *See* Maj. Op. at 659. The "Speech or Debate" protected by the Constitution includes only "legitimate legislative activity," *see, e.g., Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), and "[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act," *Brewster*, 408 U.S. at 526, 92 S. Ct. 2531. Here, the warrant sought only "fruits, instrumentalities and evidence of violations of" various federal bribery and fraud statutes involving Rep. Jefferson,[4] *see* Warrant Aff., *reprinted in* Joint Appendix (JA) at 7; Sealed Appendix (SA) 18-25, which plainly are outside the bounds of protected legislative activities, *see Brewster*, 408 U.S. at 526, 92 S. Ct. 2531. Having found "probable cause to believe that" Rep. Jefferson's congressional office "contains property constituting evidence of the commission of . . . bribery of a public official, . . . wire fraud[,] . . . bribery of a foreign official . . . [and] conspiracy to commit" these crimes and having issued a search warrant aimed solely at such evidence,

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[4] They include 18 U.S.C. § 201 (bribery of public official), 18 U.S.C. §§ 1343, 1346 and 1349 (wire fraud and deprivation of honest services), 15 U.S.C. §§ 78dd-1 *et seq.* (bribery of foreign official) and 18 U.S.C. § 371 (conspiracy to commit bribery, wire fraud and bribery of foreign official). *See* Warrant Aff. at JA 7.

see Warrant Aff. at JA 87-88 (internal citations omitted), the district court ensured that the warrant encompassed only unprivileged records. And it is, of course, the judiciary, not the executive or legislature, that delineates the scope of the privilege. *See United States v. Nixon*, 418 U.S. 683, 703-04, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (citing Speech or Debate Clause cases to illustrate judicial power to define scope of executive privilege); *cf. In re Search of Rayburn House Ofice Bldg. Room No. 2113 (Rayburn)*, 432 F. Supp. 2d 100, 116 (D.D.C. 2006) ("A federal judge is not a mere rubber stamp in the warrant process, but rather an independent and neutral official sworn to uphold and defend the Constitution.").

Notwithstanding the search warrant sought only unprivileged records, Rep. Jefferson's congressional office, as the warrant itself manifests,[5] also contained records, paper and electronic, of legislative acts to which the Clause's protection extends. Execution of the warrant necessarily required the FBI agents to separate unprivileged responsive records from privileged records of legislative acts. It is this aspect of the warrant's execution that Rep. Jefferson claims violated the Clause because it constituted impermissible "question[ing]" of

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[5] The warrant includes "special procedures in order to minimize the likelihood that any potentially politically sensitive, non-responsive items in the Office will be seized" by "identify[ing] information that may fall within the purview of the Speech or Debate Clause . . . or any other pertinent privilege." Warrant Aff. at JA 79; *see also id.* at JA 80-87 (directing search team to seize only records responsive to warrant and to provide potentially privileged records to Rep. Jefferson and to district court to determine privilege *vel non*); Search Warrant (May 21, 2006), *reprinted in* JA at 3 (incorporating Warrant Affidavit by reference).

him. *See* Appellant's Br. at 13-22; U.S. Const. Art. I, § 6, cl. 1. I disagree.[6]

The execution of a valid search warrant is an "exercise of executive power," *United States v. Grubbs*, 547 U.S. 90, 126 S. Ct. 1494, 1501, 164 L. Ed. 2d 195 (2006) (internal quotation omitted), and, as noted, the Supreme Court has made clear that the Clause "does not purport to confer a general exemption upon Members of Congress" from criminal process, *Gravel*, 408 U.S. at 626, 92 S. Ct. 2614.[7] Nevertheless, my colleagues conclude that

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[6] The majority is incorrect in suggesting that I "fail[ ] to distinguish between the lawfulness of searching a congressional office pursuant to a search warrant and the lawfulness of the manner in which the search is executed." Maj. Op. at 661. The distinction is what these fourteen pages discuss. The warrant was lawfully issued because it does not seek evidence of "[a] legislative act . . . generally done in Congress in relation to the business before it," *United States v. Brewster*, 408 U.S. 501, 512, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972), but rather evidence of crimes, *see supra* pp. 655-56. Unlike the majority, however, I believe that neither the Supreme Court nor *Brown & Williamson* holds that the Clause precludes Executive Branch execution of a search warrant. *See infra* pp. 657-61.

[7] Rep. Jefferson places considerable emphasis on the fact that "the executive branch executed a search warrant on the legislative office of a sitting Member of Congress for the first time in the history of the United States." Appellant's Br. at 1. That does not mean that the Executive Branch is without power to execute such a warrant; it just as likely indicates that never before has the Executive Branch found its use necessary. Indeed, this unique moment in our nation's history is largely of the Representative's own making. For months, the government repeatedly tried and failed—due in part to Rep. Jefferson's invocation of his Fifth Amendment right—to obtain records in his congressional office via a series of subpoena *duces tecum*. *See* SA at 54-74. Only after failing to obtain the records through investigative means within Rep. Jefferson's ability to control did the government turn to a search warrant, which minimizes Rep. Jefferson's role—and his Fifth Amendment right. Moreover, Rep. Jefferson's proposed method of

the holding in *Brown & Williamson*, *see* 62 F.3d at 418-21, establishes that "the disclosure of legislative material" during the execution of a search warrant, Maj. Op. at 660, amounts to prohibited "question[ing]" because the Clause embodies a broad "non-disclosure privilege," Maj. Op. at 660, that safeguards the absolute confidentiality of legislative records even from criminal process. With respect, I believe they vastly over-read *Brown & Williamson*. That holding prohibited the production of certain records in a congressional subcommittee's possession in response to a civil subpoena. *See Brown & Williamson*, 62 F.3d at 418-19 (citing *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 857-59 (D.C. Cir. 1988)). It found no functional difference between compelling a Member to be "questioned" orally and compelling him to produce documents in response to a subpoena. *See id.* at 420-21.

Yet, as the district court noted, "the difference between a warrant and a subpoena is of critical importance here." *Rayburn*, 432 F. Supp. 2d at 111. Answering a civil subpoena requires the individual subpoenaed to affirmatively act; he either produces the testimony/documents sought or challenges the subpoena's validity. In contrast, a search warrant requires that the individual whose property is to be searched do nothing affirmative. Instead, the search must first meet the requirements of the Fourth Amendment via the prior approval of "a neu-

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warrant execution—first sealing his office and allowing him to separate privileged from non-privileged records—effectively eliminates the distinction between a search warrant and a subpoena. His proposal would resurrect his Fifth Amendment right because presumably he would respond as he did to the subpoena *duces tecum*. *See infra* pp. 657-58.

tral and detached magistrate," *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 92 L. Ed. 436 (1948), and, upon that official's finding of probable cause, the warrant "authorizes Government officers to seize evidence without requiring enforcement through the courts," *United States v. Miller*, 425 U.S. 435, 446 n.8, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). The property owner is not required to respond either orally or by physically producing the property, including records. *Cf. Johnson v. United States*, 228 U.S. 457, 458, 33 S. Ct. 572, 57 L. Ed. 919 (1913) (under Fifth Amendment "[a] party is privileged from producing the evidence, but not from its production"). The FBI agents' execution of the warrant on Rep. Jefferson's congressional office did not require the latter to do anything and accordingly falls far short of the "question[ing]" the court in *Brown & Williamson* found was required of a Member in response to a civil subpoena.

Moreover, as the majority recognizes, *see* Maj. Op. at 660, in *Brown & Williamson* we relied heavily on the Clause's purpose—shielding the legislative process from disruption—in reading the Clause's prohibition of "question[ing]" broadly to protect the "confidentiality," *see Brown & Williamson*, 62 F.3d at 417-21, of records from the reach of a civil subpoena. Noting that the Speech or Debate "privilege is not designed to protect the reputations of congressmen but rather the functioning of Congress," *id.* at 419, the court concluded that document production threatened to distract the two Members from their legislative duties, *see id.* at 418 (quoting *MINPECO*, 844 F.2d at 859). We declared that "[d]ocumentary evidence can certainly be as revealing as oral communications," providing "clues as to what Congress

is doing, or might be about to do," *id.* at 420, and thereby potentially defeating the Clause's purpose to "insulate Members of Congress from distractions that 'divert their time, energy, and attention from their legislative tasks,'" *id.* at 421 (quoting *MINPECO*, 844 F.2d at 859 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975))). Given this purpose, we concluded that the Clause "permit[s] Congress to insist on the confidentiality of investigative files" and therefore barred enforcement of the subpoena. *Id.* at 420.

Brown & Williamson's non-disclosure rule, however, does not extend to criminal process. Although the presence of FBI agents executing a search warrant in a Member's office necessarily disrupts his routine, the alternative procedure proposed by Rep. Jefferson—sealing the office and permitting him to first label his records (paper and electronic) as privileged and unprivileged—would no doubt take much more of his time. Moreover, the FBI agents responsible for the search of Rep. Jefferson's congressional office went to great lengths to minimize disruption[8] by, inter alia, executing the warrant when the Congress was not meeting, imaging computer hard drives rather than searching the computers, using specific search terms for both paper and electronic records and, most important, creating Filter Teams—one for paper records and one for electronic records—and

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[8] "[T]he physical search of the Office [was] conducted by Special Agents . . . [with] no substantive role in the investigation" of Rep. Jefferson. Warrant Aff. at JA 80. These "'non-case agents'" reviewed the records in Rep. Jefferson's office only "to determine if they [were] responsive to the list of items" in the warrant, thereafter "deliver[in] the seized . . . records to" the Filter Teams. *Id.*

ensuring subsequent in camera judicial review to minimize exposure to privileged records. *See* Warrant Aff. at JA 79-87. The Filter Teams consisted of FBI agents with no prior "role or connection to the investigation" of Rep. Jefferson and whose "roles in the investigation [were] confined to . . . review[ing] the . . . records seized from the Office to validate that they are responsive to the list" contained in the warrant. *Id.* at 81 (describing filtering procedures for paper records); *id.* at 84-85 (electronic records). By creating the Filter Teams and "[b]y requiring judicial approval before any arguably privileged documents could be shared with the prosecution team, the search procedures as a whole eliminated any realistic possibility that evidence of Rep. Jefferson's legislative acts would be used against him." Appellee's Br. at 26.

Disruption aside, it is well settled that a Member is subject to criminal prosecution and process. *See Brewster*, 408 U.S. at 516, 92 S. Ct. 2531 (Clause's "purpose [is not] to make Members of Congress super-citizens, immune from criminal responsibility"); *Gravel*, 408 U.S. at 626, 92 S. Ct. 2614.[9] The core activity protected by the Clause—speech in either chamber of the Congress—is a public act. In essence, therefore, what the Clause promotes is the Member's ability to be open in debate—free from interference or restriction—rather than any secrecy right. That candor is the animating purpose of the Clause is plain from the historical roots

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[9] *Cf.* U.S. Const. Art. I, § 6, cl. 1: "The Senators and Representatives . . . shall in all Cases, *except* Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . . ." (emphasis added).

of the privilege. In drafting the Speech or Debate Clause, the Framers drew upon English history and the "long struggle for parliamentary supremacy" against "Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators" from publicly opposing the Crown. *Johnson*, 383 U.S. at 178, 86 S. Ct. 749; *see also Tenney*, 341 U.S. at 372, 71 S. Ct. 783 ("The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.").

And while it is true that, once it attaches, the Clause "is an absolute bar to interference" with legislators, *Eastland*, 421 U.S. at 503, 95 S. Ct. 1813 (citing *Doe v. McMillan*, 412 U.S. 306, 314, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973)), recognizing that the privilege is absolute once it attaches begs the question whether the Clause attaches to begin with.[10] Significantly, in *Brown & Williamson* we expressly recognized that the Clause's "testimonial privilege might be less stringently applied when inconsistent with a sovereign interest," such as the

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[10] In concluding that "there is no reason to believe that the [non-disclosure rule] does not apply in the criminal as well as the civil context," Maj. Op. at 660, my colleagues first acknowledge that "*Brown & Williamson* involved civil litigation," *id.* at 660. Nonetheless they believe *Brown & Williamson*'s discussion of the Clause was "more profound," applying equally in the criminal context merely because it "repeatedly referred to the functioning of the Clause in criminal proceedings." *Id.* Likewise, my colleagues' notion that *Brown & Williamson* applies to criminal matters because the Clause's "bar on compelled disclosure is absolute," *id.* at 660, again begs the question whether *Brown & Williamson*'s non-disclosure rule applies to criminal matters at all.

conduct of criminal proceedings. 62 F.3d at 419-20 (distinguishing *Gravel*'s criminal context from civil subpoena). My colleagues qualify *Brown & Williamson*'s reference to *Gravel*, noting "it [was] not a Member who [was] subject to criminal proceedings" or process in *Gravel*. Maj. Op. at 663. Yet, to the extent the majority reads *Brown & Williamson* to limit *Gravel* to process served on a congressional aide during a criminal investigation of a third party, that reading mischaracterizes both *Brown & Williamson* and *Gravel*. *Gravel*'s holding that the Clause does not "immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes" is replete with observations that the Clause "provides no protection for criminal conduct . . . performed at the direction of the [Member] . . . or done without his knowledge" by an aide. *Gravel*, 408 U.S. at 622, 92 S. Ct. 2614. *Gravel* makes unmistakably clear that a Member—not just a staffer—is subject to criminal liability and process, *see, e.g.*, *Gravel*, 408 U.S. at 626, 92 S. Ct. 2614 (Clause "does not privilege *either Senator or aide* to violate an otherwise valid criminal law in preparing for or implementing legislative acts" (emphasis added)), so that *Brown & Williamson*'s reference to "*Gravel*'s sensitivities to the existence of criminal proceedings against persons other than Members of Congress" does no more than describe the *Gravel* facts, *Brown & Williamson*, 62 F.3d at 419. Indeed, *Gravel* "refus[ed] to distinguish between Senator and aide in *applying* the Speech or Debate Clause," *Gravel*, 408 U.S. at 622 (emphasis added), finding instead the existence of criminal proceedings dispositive, *id.* at 626. As *Gravel* noted, his aide's privilege derives from the Member's. *Id.* at 616-17 (describing aide as Member's "alter ego[]"). Because *Gravel* stresses the significance of

criminal proceedings, rather than their target, and because his aide can invoke the Clause only if the Member can do so, the majority is wrong in maintaining that *Gravel*'s language as construed in *Brown & Williamson* is limited to "third-party" crime.[11]

Moreover, as the government points out, to conclude that the Clause's shield protects against *any* Executive Branch exposure to records of legislative acts would jeopardize law enforcement tools "that have never been considered problematic." Appellee's Br. at 37; *see also Rayburn*, 432 F. Supp. 2d at 110 ("Carried to its logical conclusion, this argument would require a Member . . . to be given advance notice of any search of his property, including property outside of his congressional office, such as his home or car, and further that he be allowed to remove any material he deemed to be covered by the legislative privilege prior to a search."). If Executive Branch exposure alone violated the privilege, "agents . . . could not conduct a voluntary interview with a congressional staffer who wished to report criminal conduct by a Member or staffer, because of the possibility . . . that the staffer would discuss legislative acts in . . . describing the unprivileged, criminal conduct." Appellee's Br. at 38. Such a rule would also "presumably apply to surveillance of a Member or staffer who might discuss legislative matters with another Member or staffer." *Id.* Furthermore, "[d]epriv-

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[11] Unlike the *Brown & Williamson* dicta, *Gravel*'s discussion of the Clause's applicability to Members should direct our analysis. *See United States v. Dorcely*, 454 F.3d 366, 375 (D.C. Cir. 2006) ("'carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative'" (quoting *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003))).

ing the Executive of the power to *investigate* and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence." *Brewster*, 408 U.S. at 525 (emphasis added); *see id.* at 524-25 (reasoning that "financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation"). On the other hand, limiting the law enforcement tools that may be used to investigate Members does undermine the "legitimate needs of the judicial process," specifically, the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Nixon*, 418 U.S. at 707. Recognizing the strength of these constitutional interests, the Supreme Court limited the scope of executive privilege—which is unquestionably a confidentiality rule—by permitting *in camera* judicial review of executive records to meet "[t]he need to develop all relevant facts" in a criminal prosecution. *Id.* at 709. The majority, in barring Executive Branch execution of a search warrant—and, by extension, other common investigatory tools—based on mere exposure to privileged records, checks the Judicial Branch as well. *Cf. Brewster*, 408 U.S. at 508 ("speech or debate privilege was designed to preserve legislative *independence*, not supremacy") (emphasis added).[12]

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[12] Again in dicta, *Brown & Williamson* rejected the Third Circuit's holding in *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978), that the Clause merely prohibits evidentiary use of records of legislative acts but not their disclosure, concluding instead that the interest in protecting the functioning of the legislature may permit the Congress "to insist on the confidentiality of investigative files," *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 420 (D.C. Cir. 1995). And again the criminal context distinguishes *Brown & Williamson*'s

In sum, I believe the Executive Branch's execution of a search warrant on a congressional office—with its unavoidable but minimal exposure to records of legislative acts—does not constitute "question[ing]" within the meaning of the Speech or Debate Clause. On this reading of the Clause, Rep. Jefferson remains subject to the same criminal process that applies to his constituents. *See Gravel*, 408 U.S. at 626. As "[t]he laws of this country allow no place or employment as a sanctuary for crime," *Williamson v. United States*, 207 U.S. 425, 439, 28 S. Ct. 163, 52 L. Ed. 278 (1908) (quoting *King v. Willkes*, 2 Wils. 151 (1763)), I would conclude that the Speech or Debate Clause does not bar the Executive Branch's execution of a search warrant on a congressional office and, accordingly, deny Rep. Jefferson's Rule 41(g) motion.[13]

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dicta from this case. For example, in *Brewster*, a case involving the criminal prosecution of a Member, the Supreme Court described the violation of the Clause that occurred in *United States v. Johnson*, 383 U.S. 169, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966)—another criminal case—as arising from "the *use* of evidence" of a legislative act to support the indictment. *Brewster*, 408 U.S. at 510, 92 S. Ct. 2531 (emphasis added). According to *Brewster*, "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts." *Id.* at 512, 92 S. Ct. 2531. Thus, in the criminal context the Supreme Court has indicated that it is the Executive Branch's evidentiary use of legislative acts, rather than its exposure to that evidence, that violates the Clause.

[13] At trial Rep. Jefferson may assert Speech or Debate Clause immunity to bar the use of records he claims are privileged. *Cf. Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 13-16 (D.C. Cir. 2006) (affirming denial of Member's motion to dismiss on Speech or Debate Clause ground but noting that even "[w]hen the Clause does not preclude suit altogether," it "may preclude some relevant evidence")

(en banc), *cert. denied, Office of Sen. Mark Dayton v. Hanson*, ___U.S. ___, 127 S. Ct. 2018, 2020, 167 L. Ed. 2d 898 (2007); *Johnson*, 383 U.S. at 185 ("With all references to [legislative material] eliminated [from the indictment], we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause."). At this stage, however, Rep. Jefferson is entitled only to copies of the records seized by the government and judicial review of any record he claims is privileged, as our July 28, 2006 order provides. *See United States v. Rayburn House Office Bldg., Room 2113*, No. 06-3105 (D.C. Cir. July 28, 2006). To the extent the majority suggests that—if a Member can show disruption of his legislative activities—the government may be required to return *non-privileged* material to remedy a violation of the Clause, Maj. Op. at 665-66, thereby potentially depriving the Executive Branch of records bearing on criminality, it is a suggestion I categorically reject.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 06-0231 M-01

IN RE SEARCH OF THE RAYBURN
HOUSE OFFICE BUILDING ROOM NUMBER 2113
WASHINGTON, D.C. 20515

July 10, 2006

MEMORANDUM OPINION

HOGAN, Chief Judge.

"All laws should be made to operate as much on the law makers as upon the people; . . . Whenever it is necessary to exempt any part of the government from sharing in these common burthens, that necessity ought not only to be palpable, but should on no account be exceeded." 2 Founders' Constitution 331 (Philip B. Kurland & Ralph Lerner eds., 1987) (James Madison, The Militia Bill, House of Representatives (Dec. 16, 1790)). Pending before the Court is Congressman William J. Jefferson's Motion for Return of Property and Emergency Motion for Interim Relief, in which he contends that the execution of a search warrant on his congressional office was unlawful in violation of the Constitution's Speech or Debate Clause, separation of powers princi-

ple, and Fourth Amendment.[1] Having carefully considered the submissions of Congressman Jefferson, the Bipartisan Legal Advisory Group of the Unites States House of Representatives as *amicus curiae*, and the Government, the Court will deny the motion.[2]

I. BACKGROUND[3]

Over the past year, the Federal Bureau of Investigation ("FBI") has been conducting an investigation into whether Congressman William J. Jefferson and other individuals bribed or conspired to bribe a public official,

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[1] Congressman Jefferson's Motion for Emergency Interim Relief sought an Order enjoining FBI agents and the Department of Justice from reviewing or inspecting the seized items and sequestering those items in a secure place. On May 25, 2006, the President issued a Memorandum directing the Solicitor General to take sole custody of the materials seized from Congressman Jefferson's office, and to seal and sequester those materials from anyone outside of the Solicitor General's office for forty-five days. Accordingly, the Motion for Emergency Interim Relief is now moot.

[2] The Bipartisan Legal Advisory Group presents the institutional position of the U.S. House of Representatives in litigation matters. The members of the Group are the Honorable J. Dennis Hastert, Speaker of the House; the Honorable John A. Boehner, Majority Leader; the Honorable Roy Blunt, Majority Whip; the Honorable Nancy Pelosi, Democratic Leader; and the Honorable Steny H. Hoyer, Democratic Whip. The Court granted the Group's motion for leave to file a brief as *amicus curiae* in support of Congressman Jefferson's motion in recognition of the importance of the House's interest in and position on the questions of serious constitutional magnitude that are raised in this matter.

[3] Certain portions of this litigation remain under seal. Because this Memorandum Opinion and accompanying Order shall be made available to the public, the Opinion refers only to the redacted search warrant affidavit and to other information that is already part of the public record.

committed or conspired to commit wire fraud, or bribed or conspired to bribe a foreign official, in violation of federal criminal statutes. The investigation centers around allegations that Congressman Jefferson used his position in Congress to promote the sale of telecommunications equipment and services offered by iGate—a Louisiana-based communications firm—to Nigeria, Ghana, and possibly other African nations, in return for payments of stock and cash. As of result of the Government's investigation into the scheme, one of Congressman Jefferson's former staffers pleaded guilty to bribing and conspiring to bribe Congressman Jefferson, and was sentenced to eight years of imprisonment. The President and CEO of iGate also pleaded guilty to bribing and conspiring to bribe Congressman Jefferson.

On Thursday, May 18, 2006, the Government filed with this Court an application and affidavit for a warrant to search Congressman Jefferson's congressional office for paper documents and computer files related to the alleged bribery scheme and other fraudulent transactions. According to Congressman Jefferson and The Bipartisan Legal Advisory Group, the execution of a search warrant upon the office of a sitting Congressman is apparently without historical precedent since the adoption of the Constitution more than 200 years ago. The eighty-three-page affidavit laid out the evidence the Government had obtained over the course of the investigation. The application described in detail the paper documents to be seized and the precise search terms to be used in examining the computer files. The search warrant sought no legitimate legislative material that would be considered privileged under the Speech or Debate Clause.

The application also set forth a set of "special search procedures" to be used in an effort to "minimize the likelihood that any potentially politically sensitive, nonresponsive items" would be disclosed, and also to prevent investigators and members of the Prosecution Team from obtaining documents or files "that may fall within the purview of the Speech or Debate Clause . . . or any other pertinent privilege." Aff. ¶ 136. These procedures involved the designation of a Filter Team, which was composed of two Department of Justice attorneys who were not on the Prosecution Team and an FBI agent who had no role in the investigation or prosecution of the case.

For paper documents, the Filter Team would review the documents seized to determine first whether each document was responsive, and second whether it fell within the purview of the Speech or Debate Clause or any other privilege. Any documents found to be non-responsive would be returned to counsel for Congressman Jefferson. As to the potentially privileged documents, a log and copies thereof would be provided to Congressman Jefferson's counsel within twenty days of the search. The Filter Team would then submit the documents to the Court for a final determination of privilege. Copies of documents that were found to be responsive and unprivileged would be provided to the Prosecution Team and to Congressman Jefferson's counsel within ten days of the search.

As to computer files, another designated Filter Team (made up of certified FBI computer examiners who had no role in the investigation or prosecution of the case) would perform the search of the computers, subject to the terms laid out in the warrant application. Again, the

Filter Team would screen out non-responsive and potentially privileged files in the same manner as was to be done with the paper documents.

Having found that the application and affidavit established probable cause to believe that evidence of a crime would be found in Congressman Jefferson's congressional office, the Court granted the Government's application, issued the warrant, and ordered that the search be conducted on or before Sunday, May 21, 2006. On Saturday, May 20, 2006, federal agents executed the warrant. During the search, the agents excluded both Congressman Jefferson's counsel and counsel for the U.S. House of Representatives. The agents ultimately seized copies of the hard drives of each of the office's computers and two boxes of paper records.

On Wednesday, May 24, 2006, Congressman Jefferson filed the instant motion for return of the seized material under Rule 41 of the Federal Rules of Criminal Procedure. On June 7, 2006, the Bipartisan Legal Advisory Group *("amicus")*, as *amicus curiae*, filed a brief in support of the Congressman's motion. The Government opposed the motion. On June 16, 2006, a hearing was held at which the Court heard oral argument on the motion.

II. ANALYSIS

Congressman Jefferson moves for return of the property seized during the execution of the search warrant on his congressional office under Rule 41 of the Federal Rules of Criminal Procedure, arguing that the search was unconstitutional as it violated the Speech or Debate Clause, the separation of powers principle, and the Fourth Amendment.

A. Rule 41

The Fourth Amendment shields citizens from unreasonable searches and seizures. Rule 41 of the Federal Rules of Criminal Procedure "implements the Fourth Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant." *Jones v. United States*, 357 U.S. 493, 498, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958). To be valid, a search requires "a prior showing of probable cause, the warrant authorizing [the search] must particularly describe the place to be searched, and the person or things to be seized, and . . . it may not have the breadth, generality, and long life of the general warrant against which the Fourth Amendment was aimed." *United States v. White*, 401 U.S. 745, 758, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (internal quotation marks omitted). Here, neither Congressman Jefferson nor *amicus* contend that the search warrant issued here failed to meet any of those requirements.

Congressman Jefferson and *amicus* argue that the search was nonetheless unlawful because the manner in which it was executed violated the Constitution. The Supreme Court has made clear that reasonableness is the "overriding test of compliance with the Fourth Amendment." *Zurcher v. Stanford Daily*, 436 U.S. 547, 559, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978). For it is not the case that "searches, however or whenever executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized." *Id.* at 559-60, 98 S. Ct. 1970; *accord United States v.*

Koyomejian, 970 F.2d 536, 550 (9th Cir. 1992) (Kozinski, J., concurring) ("Reasonableness is an independent requirement of the Fourth Amendment, over and above the Warrant Clause requirements of probable cause and particularity."); *United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984) ("[A] search could be unreasonable, though conducted pursuant to an otherwise valid warrant, by intruding on personal privacy to an extent disproportionate to the likely benefits from obtaining fuller compliance with the law."). "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 536-37, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). Therefore, while the issuance of the search warrant was valid, the search of Congressman Jefferson's office may still have been unlawful if it was an otherwise unreasonable invasion.

Rule 41(g) allows an owner to seek return of his property that has been unlawfully seized by the government. The rule provides in relevant part:

> A person aggrieved by an unlawful search and seizure of property . . . may move for the property's return. . . . The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g).

Actions seeking the return of property are governed by equitable principles. *Industrias Cardoen, LTDA. v.*

United States, 983 F.2d 49, 51 (5th Cir. 1993). Whether to exercise its jurisdiction to order the government to return the property is soundly within the discretion of the trial court. *Id.* Here, the Government urges the Court not to exercise its equitable jurisdiction to decide the Motion for Return of Property at this time.

Generally, where a grand jury investigation has commenced, a decision on a Rule 41(g) motion should be deferred until after an indictment has been issued, in the absence of irreparable harm. *See, e.g., United States v. Douleh*, 220 F.R.D. 391, 397 (W.D.N.Y. 2003).[4] Here,

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[4] Courts' reluctance to address Rule 41 motions for return of property during criminal investigations stems from the principle that the exclusionary rule does not apply to proceedings before a grand jury. *See, e.g., In re Two Search Warrants Issued March 14, 1986*, 110 F.R.D. 354, 355 (E.D.N.Y. 1986) (citing *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974)).

> Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial. Permitting witnesses to invoke the exclusionary rule before a grand jury would . . . delay and disrupt grand jury proceedings.

Calandra, 414 U.S. at 349, 94 S. Ct. 613. Motions for return of property were formerly made pursuant to Rule 41(e), under which an unlawful seizure claim was considered to be equivalent to a motion to suppress. See *Douleh*, 220 F.R.D. at 397 n.5. Effective December 1, 2002, however, Rule 41 was amended and reorganized. What was formerly found at Rule 41(e) is now found at Rule 41(g). Pursuant to the amendments, under Rule 41(g) a court may return seized property to a claimant and "impose reasonable conditions to protect access to the property and its use in later proceedings." Fed. R. Crim. P. 41(g). Accordingly, it is no longer the case that property returned subject to a Rule 41(g) motion is necessarily excluded from use in front of the grand jury.

Congressman Jefferson submits that he has suffered irreparable harm, with no adequate remedy at law, because the violation of his constitutional rights cannot be vindicated by an action for damages or any other traditional legal relief. Reply Mem. Of Congressman Jefferson in Supp. of Mot. For Return of Property ("Reply") 21. While Congressman Jefferson overlooks the sure availability of a motion to suppress the evidence seized during the search should the Government's investigation result in his indictment, the Court recognizes that ["t]he unprecedented search of Congressman Jefferson's office has raised questions of serious constitutional magnitude that directly implicate the fundamental workings of the federal government." Reply 19. The Court agrees that the interests of justice demand that these issues be addressed now. Cf. *Helstoski v. Meanor*, 442 U.S. 500, 506-08, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979) (denial of motion to dismiss indictment may be immediately appealed when based on the Speech or Debate Clause because there is no other way to provide the full protections of the privilege).

B. Constitutionality of the Search

Congressman Jefferson contends that the execution of the search warrant on his congressional office violated the absolute privilege and immunity that Members of Congress enjoy under the Speech or Debate Clause of the Constitution and the separation of powers principle. Further, according to Congressman Jefferson, the search was unreasonable in violation of the Fourth Amendment because his counsel was excluded from the search, and because the search warrant affidavit contained the flawed premise that the Government had ex-

hausted all other reasonable methods of obtaining the evidence sought.

1. *Speech or Debate Clause*

Congressman Jefferson first argues that the search of his congressional office was an unconstitutional violation of his legislative privilege under the Speech or Debate Clause. Article I, Section 6, Clause 1 of the Constitution provides in relevant part:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

This language, known as the Speech or Debate Clause, was approved at the Constitutional Convention without discussion and without opposition. See *United States v. Johnson*, 383 U.S. 169, 177, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966) (citing V Elliot's Debates 406 (1836 ed.); II Records of the Federal Convention 246 (Farrand ed. 1911)). The language was derived from Article V of the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress," which in turn was taken from the English Bill of Rights of 1689: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." *Id.* at 177-78, 86 S. Ct. 749 (citing 1 W. & M., Sess. 2, c. 2).

The language in the English Bill of Rights reflected the culmination of a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. *Id.* at 178, 86 S. Ct. 749. The privilege was designed as an important protection of the independence and integrity of the legislature. *Id.* "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." *Id.* at 179, 86 S. Ct. 749 (quoting The Federalist No. 48 (James Madison) (J. Cooke ed., 1961)).

While the Speech or Debate Clause has English roots, it must be interpreted in light of the American constitutional scheme of government. *Brewster*, 408 U.S. at 508, 92 S. Ct. 2531. In the American governmental structure, the clause serves the additional purpose of reinforcing the separation of powers designed by the Founders. *Johnson*, 383 U.S. at 178, 86 S. Ct. 749. Importantly, as Chief Justice Burger observed, it must be remembered that our system of government differs from the English system in that unlike their Parliament, our Congress is not the supreme authority but a coordinate branch. See *United States v. Brewster*, 408 U.S. 501, 508, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972). "Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *Id.*

The first Supreme Court decision that addressed the Speech or Debate Clause held that the privilege should

be read broadly, to include not only "words spoken in debate," but anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L. Ed. 377 (1880). When the Clause applies, it is an absolute privilege. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975) ("The question to be resolved is whether the actions of the petitioners fall within the sphere of legitimate legislative activity. If they do, the petitioners shall not be questioned in any other Place about those activities since the prohibitions of the Speech or Debate Clause are absolute.") (internal quotation marks omitted) (footnote omitted).

It is well established that the Clause provides Members of Congress with two distinct privileges. See *Gravel v. United States*, 408 U.S. 606, 614, 92 S.Ct. 2614, 33 L. Ed. 2d 583 (1972). The first is that they are free from arrest while attending or traveling to or from a session of their House. *Id.*[5] It is clear, however, that the "constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws . . . Indeed, implicit in the narrow scope of the privilege of freedom from arrest is, as [Thomas] Jefferson noted, the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons." *Id.*

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[5] "History reveals, and prior cases so hold, that this part of the Clause exempts Members from arrest in civil cases only." *Gravel*, 408 U.S. at 614, 92 S. Ct. 2614; *Williamson v. United States*, 207 U.S. 425, 28 S. Ct. 163, 170, 52 L. Ed. 278 (1908) ("[T]he term 'treason, felony, and breach of the peace,' as used in the [Speech or Debate Clause], excepts from the operation of the privilege all criminal offenses . . .").

at 615, 92 S. Ct. 2614 (citing T. Jefferson, Manual of Parliamentary Practice, S. Doc. No. 92-1, p. 437 (1971)).

The second privilege provided to Members of Congress by the Clause shields them from questioning in any other place for any speech or debate in either House. *Gravel*, 408 U.S. at 615, 92 S. Ct. 2614. Members may not be made to answer, either in terms of questions or in terms of defending themselves from prosecution, for speech or activities done in furtherance of the legislative process. *Id.* at 616, 92 S. Ct. 2614. Accordingly, the Speech or Debate Clause provides both a testimonial privilege and immunity from liability for legitimate legislative acts. See *McSurely v. McClellan*, 553 F.2d 1277, 1299 (D.C. Cir. 1976) ("[T]he Speech or Debate Clause acts as an exclusionary rule and testimonial privilege, as well as substantive defense . . .").

The Speech or Debate privilege "is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members." *Brewster*, 408 U.S. at 525, 92 S. Ct. 2531; *Doe v. McMillan*, 412 U.S. 306, 317, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973) ("[T]he Speech or Debate Clause has finite limits . . ."). The issue here is whether the Speech or Debate Clause's privileges and immunities extend so far as to insulate a Member of Congress from the execution of a valid search warrant on his congressional office.

Congressman Jefferson argues that because the Government necessarily reviewed and seized privileged material during the search, without giving Jefferson the opportunity to first segregate such privileged material,

the execution of the search violated the Constitution. Congressman Jefferson and *amicus* are both clear that it is not their position that the office of a Member of Congress may never be searched pursuant to a valid warrant. Rather, they argue that the discovery of privileged material by the Executive Branch during the search rendered it unconstitutional. See Reply 9. According to Congressman Jefferson, a search on a congressional office could be executed only *after* the Member of Congress is given the initial opportunity to identify and remove what he deems to be privileged material. See Mem. in Supp. of Mot. for Return of Property ("Mem.") 13-14. Carried to its logical conclusion, this argument would require a Member of Congress to be given advance notice of any search of his property, including property outside of his congressional office, such as his home or car, and further that he be allowed to remove any material he deemed to be covered by the legislative privilege prior to a search.[6]

Congressman Jefferson argues that this matter is controlled by *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), which reinforced the principle that the Speech or Debate Clause's testimonial privilege is absolute. In that case, the United States Court of Appeals for the District of Columbia Circuit quashed subpoenas issued to two Members of

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[6] While Congressman Jefferson does not challenge the Executive's authority to search his home or car, see Reply 2 n.1, if the discovery of privileged legislative material by the Government is a violation of the Constitution, then any location in which legislative material is kept (thus subjecting it to inadvertent seizure) would be insulated from a search, absent prior notice and opportunity to remove the privileged material.

Congress, finding that the Speech or Debate Clause barred enforcement of the subpoenas because the materials sought were privileged as they came into the Members' possession through the legitimate legislative process. See *id.* at 421. The D.C. Circuit held that "documents or other material that comes into the hands of congressmen may be reached either in a direct suit or a subpoena only if the circumstances by which they come can be thought to fall outside 'legislative acts' or the legitimate legislative sphere." *Id.*

Congressman Jefferson's argument blurs the line between a subpoena and a search warrant—this argument reminds one of the proverb that "the most dangerous thing in the world is to try to leap a chasm in two jumps." David Lloyd George, British Prime Minister (1863-1945). In fact, the difference between a warrant and a subpoena is of critical importance here. A search warrant, in contrast to a subpoena, is subject to the stringent requirements of the Fourth Amendment, may be issued only pursuant to prior judicial approval, and authorizes Government officers to seize evidence without requiring enforcement through the courts. See *United States v. Miller*, 425 U.S. 435, 446 n.8, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). In contrast, "the person served [with a subpoena] determines whether he will surrender the items identified in the subpoena or challenge the validity of the subpoena prior to compliance." *In re Grand Jury Subpoenas Dated Dec. 10, 1987*, 926 F.2d 847, 854 (9th Cir. 1991). Because the case addressed civil subpoenas, and says nothing about the availability of documents pursuant to a search warrant

in a criminal investigation, *Brown & Williamson* does not control here.[7]

The Court recognizes that the Speech or Debate Clause provides Congressman Jefferson with a testimonial privilege, and further that the testimonial privilege is absolute. Unlike producing evidence in response to a subpoena, however, which is a testimonial act, see *United States v. Hubbell*, 530 U.S. 27, 36-37, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000), having one's property subjected to the execution of a valid search warrant does not have a testimonial component. See *Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (describing "testimonial" evidence).

Thus, the Speech or Debate Clause's testimonial privilege was not triggered by the execution of the search warrant. Cf. *Andresen v. Maryland*, 427 U.S. 463, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976); *Johnson v. United States*, 228 U.S. 457, 458, 33 S. Ct. 572, 57 L. Ed. 919 (1913) ("A party is privileged from producing the evidence but not from its production."). In *Andresen*, the Supreme Court held that the execution of a search warrant does not trigger the Fifth Amendment's testimonial privilege because there is no compulsion to speak or act:

> ". . . petitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing. The

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[7] In *Brown & Williamson*, the D.C. Circuit acknowledged that the outcome in a case involving criminal rather than civil process may be different, when it noted that the Supreme Court has "at least suggest[ed] that the testimonial privilege might be less stringently applied when inconsistent with a sovereign interest" such as the sovereign interest in law enforcement. 62 F.3d at 419-20.

> search for and seizure of these records were conducted by law enforcement personnel. Finally, when these records were introduced at trial, they were authenticated by a handwriting expert, not by petitioner. Any compulsion of petitioner to speak, other than the inherent psychological pressure to respond at trial to unfavorable evidence, was not present."

427 U.S. at 473, 96 S. Ct. 2737. Similarly here, Congressman Jefferson was not made to say or do anything. In fact, as his motion highlights, he was not even present at the search. Like in *Andresen*, there simply was no compulsory testimony to trigger the privilege. The Speech or Debate Clause protects Members of Congress from being "questioned." U.S. Const. art. I, § 6, cl. 1. Here, Congressman Jefferson has not been "questioned" in any way. Just as a search warrant does not trigger the Fifth Amendment's testimonial privilege, neither does a search trigger the Speech or Debate Clause's testimonial privilege.

Amicus argues that *Andresen's* principle that a search warrant does not trigger a testimonial privilege is inapplicable here because the Speech or Debate Clause protects against any compelled disclosure of legislative activities and information, not inferences that may be drawn from the act of producing documents as with the Fifth Amendment. See Mem. of P. & A. of the Bipartisan Legal Advisory Group of the U.S. House of Representatives as *Amicus Curiae* ("*Amicus* Brief") 23 n.15. The arguments made by Congressman Jefferson and *amicus* stand for the proposition that legislative material is absolutely privileged from review by or disclosure to either of the co-equal branches of government. While it is important to recognize that different

policies undergird the Speech or Debate privilege and the Fifth Amendment's privilege against self-incrimination, the argument made by *amicus* contorts the policies behind the Speech or Debate Clause.

The purpose of the Speech or Debate Clause is not to promote or maintain secrecy in legislative activity. As Justice Douglas once stated, "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *EPA v. Mink*, 410 U.S. 73, 105, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973) (Douglas, J., dissenting) (quoting Henry Steele Commager from The New York Review of Books, Oct. 5, 1972, at 7).

The purpose of the Speech or Debate Clause is rather to protect the independence and integrity of the legislature by not questioning Members of Congress for their legitimate legislative acts. See *Brown & Williamson*, 62 F.3d at 416 (legislative privileges and immunities designed "to prevent intimidation by the executive and accountability before a possibly hostile judiciary") (quoting *United States v. Johnson*, 383 U.S. 169, 181, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966)). The Fifth Amendment also protects one from being compelled to answer questions. Just as the Fifth Amendment does not protect a person from disclosure of incriminating evidence, the Speech or Debate Clause does not prohibit disclosure of legislative material. Rather, it prohibits a Member from having to answer questions as to his legislative activity. Here, Congressman Jefferson has not been questioned about actions that fall within the sphere of legitimate legislative activity.

The D.C. Circuit has held that the "touchstone" of the Speech or Debate Clause privilege is interference with legislative activities. *Brown & Williamson*, 62 F.3d at 421. Thus the Court's decision here depends upon whether the execution of the search warrant impermissibly interfered with Congressman Jefferson's legislative work. See *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988). Unlike in *Brown & Williamson*, the material sought here was not privileged as it did not fall within the legitimate legislative sphere. Accordingly, the Court finds that the search did not impermissibly interfere with Congressman Jefferson's legislative activities.

Congress' capacity to function effectively is not threatened by permitting congressional offices to be searched pursuant to validly issued search warrants, which are only available in relation to criminal investigations, are subject to the rigors of the Fourth Amendment, and require prior approval by the neutral third branch of government. As discussed earlier, search warrants are very different from subpoenas, which may be issued at will, are subject only to the broadest standard of relevance, and require the active participation of the recipient.

Finally, the Court finds no support for the proposition that a Member of Congress must be given advance notice of a search, with an opportunity to screen out and remove materials the Member believes to be privileged. Indeed, the Court is aware of no case in which such a procedure is mandated by any other recognized privilege. To the contrary, in *Zurcher*, the Supreme Court expressly rejected such a requirement where the location to be searched contained material protected under

the First Amendment. 436 U.S. at 567, 98 S. Ct. 1970 ("[W]e decline to reinterpret the [Fourth] Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants."). The Supreme Court held that no special protections are required when a search warrant is sought for a newspaper office, finding that the standard preconditions for a warrant are sufficient to protect against unjustified intrusions on the press. *Id.* at 565, 98 S. Ct. 1970. The Court stated:

> Aware of the long struggle between Crown and press and desiring to curb unjustified official intrusions, the Framers took the enormously important step of subjecting searches to the test of reasonableness and to the general rule requiring search warrants issued by neutral magistrates. They nevertheless did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated. . . . Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

Id. Similarly here, the Framers were well aware of the long struggle between Crown and the legislature, yet did not forbid warrants where the Legislative Branch is

involved and did not impose any additions to the preconditions for such a warrant. As in *Zurcher*, the preconditions for a properly administered warrant that seeks only unprivileged material that falls outside the sphere of legitimate legislative activity are sufficient to protect against the harms assertedly being threatened here. No one argues that the warrant executed upon Congressman Jefferson's office was not properly administered. Therefore, there was no impermissible intrusion on the legislature.

The fact that some privileged material was incidentally captured by the search does not constitute an unlawful intrusion.[8] See *In re Possible Violations of 18*

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[8] The cases that address how to remedy the improper use of protected legislative material in a criminal prosecution support the proposition that the mere disclosure of Speech or Debate material to the Government does not offend the Constitution, as in those cases, privileged material had certainly been exposed to the Government. The remedy imposed in those cases was simply that the material was excluded from use against a Member of Congress. See *Johnson*, 383 U.S. at 185, 86 S. Ct. 749 ("With all references to [Speech or Debate material] eliminated [from the indictment], we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause."); *United States v. Rostenkowski*, 59 F.3d 1291, 1300 (D.C. Cir. 1995) ("[T]he Government does not have to establish an independent source for the information upon which it would prosecute a Member of Congress. Rather . . . the Member must show that the Government has relied upon privileged material."); *Id.* at 1301 (where "the indictment is valid on its face, the Speech or Debate Clause does not require pre-trial review of the evidence to be presented at trial"); *United States v. McDade*, 28 F.3d 283, 300 (3d Cir. 1994) (even if two overt acts were alleged in violation of the Clause, there were "numerous other overt acts" to support the indictment); *United States v. Myers*, 635 F.2d 932, 941 (2d Cir. 1980) (dismissal not required although grand jury heard "some evidence of legislative acts that is privileged by the Speech or

U.S.C. §§ 201, 371, 491 F.Supp. 211, 214 n.2 (D.D.C. 1980) ("The Speech or Debate Clause does not protect confidentiality of material"). The Speech or Debate Clause is not undermined by the mere incidental review of privileged legislative material, given that Congressman Jefferson may never be questioned regarding his legitimate legislative activities, is immune from civil or criminal liability for those activities, and no privileged material may ever be used against him in court.

Amicus contends that even a review of the documents by the Court to determine privilege is unconstitutional. See *Amicus* Brief 29. Contrary to the arguments of *amicus*, legislators do not have the right to determine the scope of their own privilege under the Speech or Debate Clause. The Founders expressly rejected a constitutional proposal that would have permitted Members collectively to be the exclusive judges of their own privileges. 2 *Records of the Federal Convention of 1787* 503 (Max Ferrand ed., 1966). In opposition to the proposal, Madison explained that it would be preferable "to make provision for ascertaining by law" the extent of privileges "previously & duly established" rather than to "give a discretion to each House as to the extent of its own privileges." *Id.* Indeed, it is the Judicial Branch that ascertains the requirements of the law in accordance with Article III of the Constitution. See *United States v. Nixon,* 418 U.S. 683, 704-05, 94 S. Ct.

Debate Clause"); *compare United States v. Helstoski,* 635 F.2d 200, 205-06 (3d Cir. 1980) (indictment must be dismissed where the "improper introduction of privileged matter permeated the whole proceeding"). None of these cases suggest that the *exposure* of protected legislative material to the Government violated the Speech or Debate Clause.

3090, 41 L. Ed. 2d 1039 (1974) (citing The Federalist No. 47, at 313 (S. Mittell ed., 1938)).

The power to determine the scope of one's own privilege is not available to any other person, including members of the co-equal branches of government: federal judges, see *In re Certain Complaints Under Investigation*, 783 F.2d 1488, 1518-20 (11th Cir. 1986), or the President of the United States, see *Nixon*, 418 U.S. at 703-05, 94 S. Ct. 3090. When President Nixon asserted that the "separation of powers doctrine precludes judicial review of a President's claim of privilege," the Supreme Court held that it is "the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case." *Nixon*, 418 U.S. at 703-05, 94 S. Ct. 3090 (quoting *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177, 2 L. Ed. 60 (1803)). In *Nixon*, the Court supported its conclusion regarding the executive privilege by relying upon a series of cases interpreting the explicit immunity conferred by the Speech or Debate Clause. 418 U.S. at 704, 94 S. Ct. 3090 (citing *Doe v. McMillan*, 412 U.S. 306, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973); *Gravel*, 408 U.S. 606, 92 S. Ct. 2614, 33 L.Ed.2d 583; *Brewster*, 408 U.S. 501, 92 S. Ct. 2531; *Johnson*, 383 U.S. 169, 86 S. Ct. 749, 15 L. Ed. 2d 681). The Court stated that it has "consistently exercised the power to construe and delineate claims arising under express powers" such as the legislative privilege. *Nixon*, 418 U.S. at 704, 94 S. Ct. 3090.

The formulation of the Speech or Debate privilege "implies that the judiciary cannot avoid determining what are the outer limits of legitimate legislative process." *Brown & Williamson*, 62 F.3d at 415. The claim by *amicus* that the Constitution does not allow a docu-

ment- by-document review by the judiciary fails. See *In re Possible Violations of 18 U.S.C. §§ 201, 371,* 491 F. Supp. 211 (D.D.C. 1980) (ordering *in camera* hearing to determine whether subpoenaed documents were covered by the legislative privilege at which Government was allowed to be present and to contest the claims of privilege); *Benford v. Am. Broad. Cos.*, 98 F.R.D. 42, 45 & n.2 (D. Md. 1983) (requiring detailed index of potentially privileged documents under Speech or Debate Clause to be submitted for judicial review and suggesting the need for *in camera* review of certain relevant documents "to determine whether the congressional defendants have accurately characterized their content"); cf. *Nixon*, 418 U.S. at 706, 94 S. Ct. 3090 ("Absent a claim of need to protect [national security], we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide"). The district court in *Benford* refused to "blindly accept the[] conclusory and seemingly self-serving suggestion that [the House Select Committee on Aging] will screen what is and what is not protected." 98 F.R.D. at 45. Review of allegedly privileged material by the Court is allowed and appropriate under the Constitution.

The D.C. Circuit has recognized that the Supreme Court "has been careful not to extend the scope of [the Speech or Debate Clause] further than its purposes require." *Rostenkowski,* 59 F.3d at 1302 (quoting *Forrester v. White,* 484 U.S. 219, 224, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)). The Clause's "shield does not extend beyond what is necessary to preserve the integrity of the legislative process." *Id.* (quoting *Brewster,* 408 U.S.

at 517, 92 S. Ct. 2531). The view of the Speech or Debate privilege espoused by Congressman Jefferson and *amicus* extends that privilege far beyond that which its purposes require, and far beyond anything the law can support. The Court has found no law, and Congressman Jefferson and *amicus* point to none, which sustains the provision of such a sweeping protection to Members of Congress. To do so would eviscerate the effect and purpose of a search warrant wherever legislative materials are kept.

Here, Congressman Jefferson has not been made to answer, either in terms of questions or in terms of defending himself from prosecution, for speech or activities done in furtherance of the legislative process. Therefore, the search did not violate the Speech or Debate Clause.[9]

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[9] The Government argues that even if the execution of the search warrant impermissibly intruded on legislative activity, the careful procedures established by the Government here are sufficient to protect Congressman Jefferson from suffering any prejudice. Cf. *Weatherford v. Bursey*, 429 U.S. 545, 556-58, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) (no constitutional violation where undercover agent overheard protected conversation between defendant and his attorney, but did not disclose that information to Prosecution Team, because there was not "at least a realistic possibility of injury to [defendant] or benefit to the State"). The Court finds that a harmless-error analysis is not appropriate in the context of the Speech or Debate privilege. See *United States v. Swindall*, 971 F.2d 1531, 1548 n.21 (11th Cir. 1992) ("a harmless-error analysis will not excuse a violation [of the Speech or Debate Clause]"); cf. *Brown & Williamson*, 62 F.3d at 419 ("The degree of disruption [of the legislative process] is immaterial. . . . any probing of legislative *acts* is sufficient to trigger the immunity.") (emphasis in original). Here, there was no intrusion into legitimate legislative activity, as the search warrant sought only non-privileged material, and the Congressman was not compelled to provide any testimony as to his legitimate legislative activity. The Government's incidental and cursory review of

2. *Separation of Powers*

Congressman Jefferson also argues that the issuance and execution of the search warrant in this case violated the general principle of the separation of powers, stating that "[t]he delicate balance of our democratic system was disrupted when the court authorized the executive branch to search the Member's office and peruse and remove Speech or Debate material." Mem. 13. This argument too must fail. As the Supreme Court has recognized, "The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority." *Brewster*, 408 U.S. at 523, 92 S. Ct. 2531.

Indeed, this Court intervened here with the neutral authority of the third branch as a check on the power sought to be exerted by the Executive Branch when it authorized a particularized search warrant only upon a showing of probable cause. The statement by *amicus* that if the search here is upheld, in the future the Government need "only to persuade a federal judge" to obtain warrants to search other congressional offices, is a gross trivialization of the role of the judiciary. *Amicus* Brief 33.[10] A federal judge is not a mere rubber stamp

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documents covered by the legislative privilege, in order to extract non-privileged evidence, does not constitute an intrusion on legitimate legislative activity.

[10] *Amicus* goes even further when it claims that the execution of a search warrant on a congressional office threatens to "reduce Congress to a subordinate branch of government by opening the door to unchecked executive branch overreach and abuse." *Amicus* Brief 32.

in the warrant process, but rather an independent and neutral official sworn to uphold and defend the Constitution.

If there is any threat to the separation of powers here, it is not from the execution of a search warrant by one co-equal branch of government upon another, after the independent approval of the third separate, and co-equal branch. Rather, the principle of the separation of powers is threatened by the position that the Legislative Branch enjoys the unilateral and unreviewable power to invoke an absolute privilege, thus making it immune from the ordinary criminal process of a validly issued search warrant. This theory would allow Members of Congress to frustrate investigations into non-legislative criminal activities for which the Speech or Debate Clause clearly provides no protection from prosecution. "Our speech or debate privilege was designed to preserve legislative independence, not supremacy." *Brewster*, 408 U.S. at 508, 92 S. Ct. 2531. The execution of the search warrant upon Congressman Jefferson's congressional office did not violate the separation of powers principle.

3. *Fourth Amendment*

Finally, Congressman Jefferson contends that the search of his office was unreasonable in violation of the Fourth Amendment because his counsel was barred from the office during the search, and because the Government relied on a false premise in the search warrant affidavit that it had exhausted all lesser intrusive means

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This claim does not merely trivialize the role of the Court, but actually ignores it completely.

of obtaining the evidence sought. The Court finds that there is no right to have one's counsel present during the execution of a search warrant, that there is no exhaustion requirement to the issuance of a search warrant, and further that the affidavit contained no false premise. The search was reasonable under the Fourth Amendment.

Congressman Jefferson asserts that the barring of his counsel from his office during the search violated Rule 41 and rendered the search unreasonable in violation of the Fourth Amendment. Federal Rule of Criminal Procedure 41(f)(2) provides:

> An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.

See also United States v. Daniel, 667 F.2d 783, 785 (9th Cir. 1982) ("Neither Fed. R. Crim. P. 41(d) nor the Fourth Amendment requires that the owner of the premises searched be present at the time of the inventory."). The rule says nothing about a property owner's counsel or designated representative. The Government is not required to permit a property owner or his counsel to supervise the execution of a search warrant. The plain language of the Rule clearly contemplates that the owner *need not* be present, as it explicitly provides that when an owner is not present, any "credible person"

may witness the inventory of the search. Fed. R. Crim. P. 41(f)(2).[11]

The Court is not aware of any authority, and Congressman Jefferson points to none, that holds that the right to counsel extends to the execution of a search warrant. As the Supreme Court has noted, the Constitution protects property owners not by giving them license to engage law enforcement officers in debate over the scope or basis for the warrant, but by requiring that warrants be issued by neutral magistrates and by permitting parties to seek suppression after the fact. *United States v. Grubbs*, — U.S. —, —, 126 S. Ct. 1494, 1501, 164 L. Ed. 2d 195 (2006). A right to be present at searches is not available to any other person under the Fourth Amendment. See *United States v. Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999). The Court will not create such a right for Congressman Jefferson here.

Congressman Jefferson and *amicus* also argue that the search was unreasonable because the Government did not exhaust all less intrusive approaches to obtaining the evidence. Both recognize that such a standard is nowhere to be found in Rule 41 law (indeed they cite no law supporting this argument). *Amicus* states instead that the Government "established [such a standard] for itself," and urges the Court to "hold the Justice Department to that standard." *Amicus* Brief 41; see Reply 16-17. Neither the Fourth Amendment nor Rule 41 requires the Government to establish that a search is the least intrusive means of obtaining evidence. See

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[11] Congressman Jefferson suggests that the search warrant return was defective because it "does not identify anyone in whose presence it was prepared or verified." Mem. 8. Rule 41 does not require the witness to sign or otherwise affirm the inventory or warrant return.

Zurcher, 436 U.S. at 564-68, 98 S. Ct. 1970. The Government made such a showing in the search warrant application here not because the law requires it, but to demonstrate that it did not lightly or precipitously seek a search warrant in this investigation.

To the extent that Congressman Jefferson argues that the search warrant was unreasonable because it contained false statements regarding the Government's exhaustion of lesser intrusive means of obtaining the documents, the Court finds that the affidavit to the search warrant accurately stated that the Government had exhausted all reasonable and timely alternative means of obtaining the evidence sought.

While the search here entailed an invasion somewhat greater than usual because it took place in a congressional office certain to contain privileged legislative material, the Government has demonstrated a compelling need to conduct the search in relation to a criminal investigation involving very serious crimes, and has been unable to obtain the evidence sought through any other reasonable means.[12] Therefore, the search conducted of

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[12] Searches of other areas in which privileged material is expected to be found have not been held to be unreasonable in violation of the Fourth Amendment. *See, e.g., United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31, 43 (D. Conn. 2002) (search of computer believed to contain privileged attorney-client communications using filter team, with ultimate review by magistrate judge before any document was turned over to prosecution team, was "proper, fair and acceptable method of protecting privileged communications"). While some district courts have expressed reservations about the use of filter teams in seizing material protected by the attorney-client privilege, those courts have instead favored the use of special masters, magistrate judges, or the district court itself to conduct the review. *See, e.g., United States v. Neill*, 952 F. Supp. 834, 839-42 (D.D.C. 1997). The

Congressman Jefferson's congressional office was reasonable under the Fourth Amendment. See *Camara*, 387 U.S. at 536-37, 87 S. Ct. 1727 ("[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails").[13]

III. CONCLUSION

The facts and questions of law presented here are indeed unprecedented. It is well-established, however, that a Member of Congress is generally bound to the operation of the criminal laws as are ordinary persons. The Speech or Debate Clause does not "make Members of Congress super-citizens, immune from criminal responsibility." *Brewster*, 408 U.S. at 516, 92 S. Ct. 2531. Members of Congress are not "exempt[ ] . . . from liability or process in criminal cases." *Gravel*, 408 U.S. at 626, 92 S. Ct. 2614.

The existing broad protections of the Speech or Debate Clause—absolute immunity from prosecution or suit for legislative acts and freedom from being "questioned" about those acts (including privilege from the testimonial act of producing documents in response to a subpoena)—satisfy the fundamental purpose of the Clause to protect the independence of the legislature.

Court is aware of no case, however, which has found that the presence of privileged material in the location to be searched rendered such a search unreasonable in contravention of the Fourth Amendment.

[13] The Memorandum issued by President Bush on May 25, 2006, which directed the sealing of the seized materials, expired on Sunday, July 9, 2006. Accordingly, as of Monday, July 10, 2006, the Department of Justice shall be free to regain custody of the seized materials, and to resume its review thereof.

The Court declines to extend those protections further, holding that the Speech or Debate Clause does not shield Members of Congress from the execution of valid search warrants. Congressman Jefferson's interpretation of the Speech or Debate privilege would have the effect of converting every congressional office into a taxpayer-subsidized sanctuary for crime. Such a result is not supported by the Constitution or judicial precedent and will not be adopted here. See *Williamson v. United States*, 28 S. Ct. at 167 ("[T]he laws of this country allow no place or employment as a sanctuary for crime.") (quotation omitted).

For the foregoing reasons, the Court has found that the search executed on Congressman Jefferson's congressional office was constitutional, as it did not trigger the Speech or Debate Clause privilege, did not offend the principle of the separation of powers, and was reasonable under the Fourth Amendment. Accordingly, the Court will deny the motion for return of property. An appropriate order will accompany this Memorandum Opinion.

ORDER

Pending before the Court is Congressman William J. Jefferson's Motion for Return of Property and Emergency Motion for Interim Relief. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Motion for Return of Property is DENIED. It is further ORDERED that the Emergency Motion for Interim Relief is DISMISSED as moot. It is further

ORDERED that the Clerk of the Court is directed not to seal this Order and the accompanying Memorandum Opinion, and to make those documents available to the public. It is further

ORDERED that because the Memorandum issued by President Bush on May 25, 2006, which directed the sealing of the materials seized during the execution of the search warrant at issue here, expired on Sunday, July 9, 2006, the Department of Justice shall be free to regain custody of the seized materials, and to resume its review thereof, as of Monday, July 10, 2006.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3105
September Term, 2007
06mj00231

UNITED STATES OF AMERICA, APPELLEE

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113,
WASHINGTON, D.C. 20515, APPELLANT

Filed on: Nov. 9, 2007

BEFORE: GINSBURG, Chief Judge, and SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, BROWN, GRIFFITH, and KAVANAUGH, Circuit Judges

ORDER

Appellee's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

Circuit Judges Sentelle, Henderson, Randolph, and Brown would grant the petition for rehearing en banc.

Circuit Judge Kavanaugh did not participate in this matter.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3105
September Term, 2005
06mj00231

UNITED STATES OF AMERICA, APPELLEE

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113, WASHINGTON, D.C. 20515, APPELLANT

Filed on: [July 28, 2006]

ORDER

Before: SENTELLE, BROWN and GRIFFITH, Circuit Judges.

Upon consideration of the emergency motion for stay pending appeal, the opposition thereto, and the reply, it is

ORDERED that the record be remanded to the District Court for the limited purpose of making findings regarding which, if any, documents (physical or electronic) removed by appellee from Congressman William J. Jefferson's office pursuant to a search warrant executed on May 20, 2006, are records of legislative acts.

See Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 420 (D.C. Cir. 1995). The District Court, either through a judicial officer or a special master appointed for the purpose, shall 1) copy all physical documents seized by appellee, and provide such copies to Congressman Jefferson; and 2) using the copies of computer files made by appellee, search for the terms listed in the warrant, and provide a list of responsive records to Congressman Jefferson. It is

FURTHER ORDERED that Congressman Jefferson shall, within two days of receiving the copied documents and list of responsive records, submit to the District Court, *ex parte*, any claims that specific documents or records are legislative in nature. The District Court shall review *in camera* any specific documents or records identified as legislative and make findings regarding whether the specific documents or records are legislative in nature. *Cf. Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984). It is

FURTHER ORDERED that appellee be enjoined from reviewing any documents or records seized from Congressman Jefferson's office pending further order of this Court. It is

FURTHER ORDERED that this case be held in abeyance pending the District Court's action on remand. The Clerk is directed to transmit a copy of this order to the District Court. The District Court is requested to notify this Court promptly upon its determination of the question on remand.

Per Curiam

/s/ ILLEGIBLE

86

FILED
FEB 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-816

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113, WASHINGTON, D.C. 20515
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

ROBERT P. TROUT
COUNSEL OF RECORD
AMY BERMAN JACKSON
GLORIA B. SOLOMON
TROUT CACHERIS, PLLC
1350 CONNECTICUT AVENUE, N.W.
SUITE 300
WASHINGTON, D.C. 20036
PHONE: (202) 464-3300
FAX: (202) 464-3319

COUNSEL FOR RESPONDENT

LEGAL PRINTERS, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause requires that when a warrant for the search of a Congressman's office is executed, the Member must be afforded an opportunity to segregate privileged legislative materials and shield them from review by the executive branch?

2. Whether the judgment of the court of appeals, which grants the executive access to non-privileged records seized from Rep. Jefferson's office, should be reviewed at the request of the executive when the executive has always insisted that the search warrant at issue sought only non-privileged records?

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 12

I. The Petition Is Aimed At The Opinion Of The Court Of Appeals, Not Its Judgment, And Seeks An Advisory Opinion On Matters Not Before The Court 12

II. The Court Of Appeals Correctly Concluded That The Speech Or Debate Clause Prohibits Compelled Disclosure Of Legislative Material To The Executive Branch During The Execution Of A Search. 17

A. The Non-Disclosure Privilege Is Squarely Grounded In This Court's Speech Or Debate Rulings. 18

B. The Speech Or Debate Clause Applies To Search Warrants. 24

C. Allowing Executive Agents To Review Legislative Materials During A Search Impairs Legislative Functions. 27

D. The Court Of Appeals' Decision Does Not Prevent Searches Of Congressional Offices Or Otherwise Unduly Impede Law Enforcement. 28

III. The Asserted Conflict With The Third Circuit's *Eilberg* Decision Does Not Warrant Review. 33

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Andresen v. Maryland, 427 U.S. 463 (1976) 25

Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995) 9, 19, 20, 21, 23, 25

California v. Rooney, 483 U.S. 307 (1987) 12, 14

Doe v. McMillan, 412 U.S. 306 (1973) 22

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 18, 19, 22, 28

Gravel v. United States, 408 U.S. 606 (1972) 19, 22, 27, 31

In re Grand Jury Investigation, 587 F.2d 589 (3d Cir. 1978) 33

McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1976) 23

Miller v. Transamerican Press, Inc., 709 F.2d 524 (9th Cir. 1983) 22

Miranda v. Arizona, 384 U.S. 436 (1966) 24

Princeton University v. Schmid, 455 U.S. 100 (1982) 12, 17

United States v. Brewster, 408 U.S. 501 (1972) 18, 19, 22, 25

United States v. Doe, 465 U.S. 605 (1984) 24

United States v. Helstoski, 442 U.S. 477 (1979) 19, 22

United States v. Helstoski, 635 F.2d 200 (3d Cir. 1980) 32

United States v. Hubbell, 530 U.S. 27 (2000) 24

United States v. Johnson, 383 U.S. 169 (1966) 19, 32

United States v. McDade, No. 96-1508 (3d Cir. July 12, 1996) 33

United States v. Nixon, 418 U.S. 683 (1974) 28

United States v. Rayburn House Office Building, 497 F.3d 654 (D.C. Cir. 2007) ..... passim

Statutes

18 U.S.C. § 2518(5) (2007) 31

Other Authorities

The Federalist No. 48 (James Madison) 19

U.S. Attorney's Manual, Title 9, Criminal Resource Manual § 2046 26

U.S. Attorney's Manual, Title 9, Criminal Resource Manual § 29(G) 32

Rules

Fed. R. Crim. P. 41 (2007) 5, 11

Constitutional Provisions

U.S. Const., art.I, §6, cl. 1 .....passim

U.S. Const., Amend. V 24, 25

STATEMENT OF THE CASE

Congressman William J. Jefferson submits that certiorari is not warranted in this case. Contrary to the misleading question presented, the decision below does not prohibit the execution of search warrants on Congressional offices or render Members of Congress immune from public corruption investigations. Instead, the narrow issue addressed by the court of appeals was whether the particular procedures devised by the Department of Justice ("DOJ") for the search of Rep. Jefferson's offices comported with the Speech or Debate Clause. The court concluded that they did not, because those procedures involved the compelled disclosure of legislative material to executive branch agents, with no opportunity for the Member to shield privileged material from review. This conclusion correctly applies this Court's teachings regarding the scope and absolute nature of the Speech or Debate privilege, and it permits the executive branch to execute search warrants on Congressional offices in the future as long as appropriate procedures are followed.

Further, certiorari is not warranted because DOJ's petition does not challenge the judgment of the court below that governs this case. Instead, it seeks an advisory opinion on the application of the Speech or Debate Clause to matters that are not before this Court. DOJ's petition must be considered in the context of the unique procedural posture of this case. In an unusual preliminary order, the court of appeals remanded the case to permit the

Congressman to review all of the seized documents for privilege, subject to judicial review (the "Remand Order"). At DOJ's request, the court of appeals later modified the order and authorized the release to DOJ of all documents as to which the Congressman did not claim privilege. Thus, the court of appeals accorded the Congressman the opportunity he sought to shield legislative material from review, but it also gave the executive access to what it claimed it had been seeking all along: the non-privileged records. In its brief, DOJ accepted the Remand Order and specifically argued that the search should be upheld in light of the court's remand procedures. The court incorporated the remand procedures in the judgment – as DOJ had essentially invited it to do.

Under the judgment, then, DOJ is entitled to obtain all documents determined to be outside the scope of the legislative privilege. DOJ has always asserted that its warrant sought only non-privileged documents. Thus, the judgment provides DOJ with all of the documents it claims it sought via the search that was the subject of this litigation. DOJ's petition is not aimed at obtaining additional documents or otherwise reversing the result in this case. So, its challenge is not to the actual judgment below, but only to statements contained in the opinion. What DOJ really wants is an advisory opinion on the application of the Speech or Debate Clause to other persons and other investigative techniques that were not part of this litigation. This is not an appropriate basis for a grant of certiorari.

1. On May 20 and 21, 2006, the executive branch executed a search warrant on Rayburn House Office Building Room 2113, the offices of Congressman William J. Jefferson, the elected

representative of the people of the 2nd District of Louisiana.

2. The search was conducted pursuant to a warrant issued by Chief Judge Thomas Hogan of the United States District Court for the District of Columbia. The warrant authorized the seizure of records and documents, electronic or otherwise, related to a list of 30 entities and individuals. JA 7,[1] Sealed Appendix at 18-19. The warrant permitted the agents to copy or remove the entire hard drive of each computer found in the offices. Thus, pursuant to the warrant, every paper document in the offices, and every electronic record stored on the Congressman's computer or on his staff members' computers, was subject to examination and seizure by the executive branch.

3. The affidavit set out "special procedures in order to identify information that may fall within the purview of the Speech or Debate Clause privilege." JA 79; *see* JA 79-87. These procedures, which applied to both paper records and electronic media, provided that the physical search would be conducted by "non-case agents" who had no other role in the investigation. These executive branch agents were to review all of the paper records in the Congressman's office and seize any responsive records they found. The agents were also to copy the computer hard drives from the offices, which were later to be searched electronically by the FBI to discover all records that contained any one of the

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[1] "JA" references are to the public joint appendix filed in the court of appeals. "Pet.App." references are to the appendix to the Petition.

approximately 100 computer search terms listed in the warrant.

As described in the FBI's affidavit, the paper and electronic records identified through these procedures would then be provided to a "Filter Team" consisting of DOJ lawyers and a Special Agent not otherwise involved in the investigation. The DOJ Filter Team was to review all of the records identified by the agents as responsive to determine whether the Speech or Debate privilege applied to them. Documents that the DOJ Filter Team – in its sole judgment – concluded were not privileged were to be immediately provided to the prosecution team without further review by anyone. Documents that the DOJ Filter Team determined were "potentially privileged" were to be identified in a log to be provided to the Congressman, who could then consent or object to their production, with the court to rule on his objections. JA 79-87.

The warrant procedures did not permit the Congressman to review his files and segregate legislative materials before they were examined or seized by DOJ, nor did the procedures provide the Congressman with any opportunity to assert the privilege with respect to those documents the DOJ Filter Team decided were not privileged.

4. The FBI executed the search warrant on the night of Saturday, May 20, 2006. Approximately 15 FBI agents descended on Rep. Jefferson's offices in the Rayburn House Office Building. Over the course of the next 18 hours, the agents inspected every document in the office suite and copied every computer hard drive or other electronic storage device they could find. JA 186. At the conclusion of the search, the FBI carted away

two boxes of paper files and copies of over a dozen computer hard drives or other electronic media. [2]

5. On May 24, 2006, Rep. Jefferson filed his motion for the return of all material seized pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure. The Congressman argued that the search was unconstitutional in its design and execution since it did not afford the Member any opportunity to segregate legislative material from examination and seizure by the executive branch.[3]

6. As part of his motion, Rep. Jefferson also sought an immediate order enjoining DOJ from any further review of the materials pending the resolution of his motion. JA 99-100. Before the district court could act, the President of the United States ordered that the seized material be sequestered for a forty-five day cooling off period.

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[2] The computer files were copied during the search of the Congressman's office, but were not examined by the FBI agents at that time. DOJ intended to conduct a later search of all of the seized electronic media using the terms in the warrant, and then to apply its filter team procedures to the records identified as responsive. This did not occur because of the President's freeze order and the remand procedures subsequently imposed by the court of appeals.

[3] In its written response to Rep. Jefferson's motion, DOJ offered to follow a different set of procedures for handling the seized documents. JA 132-33. The proposed revised procedures – which were not set forth in the warrant application – would have provided Rep. Jefferson with a copy of what had been removed from the office, and would have permitted him to interpose an objection to privilege decisions once they had been made by DOJ. But even under the proposed new procedures, the executive would have retained its ability to conduct an unlimited review of all records seized from Rep. Jefferson's office and computers, and the privilege determination was again assigned initially to the executive branch.

The district court then ordered that this seal be maintained while it considered the matter. JA 121.

7. A hearing on the Congressman's motion was held on June 16, 2006. On July 10, 2006, the district court denied the motion for return of property and authorized DOJ to resume its review of the Congressman's records. Rep. Jefferson filed a timely notice of appeal and urged the district court to stay the execution of its order granting the executive the right to begin an immediate review of the records.

8. After the district court denied his motion for a stay pending appeal, Rep. Jefferson filed a motion for stay in the court of appeals. In connection with its consideration of that motion, the D.C. Circuit issued an order on July 28, 2006, directing that the record be remanded to the district court for the limited purpose of making findings concerning which seized records were covered by the Speech or Debate privilege. JA 421-22, Pet.App. 75a-76a. The Remand Order specified that copies of all paper documents seized, and all computer records identified through an electronic search using the terms in the warrant, were to be provided to Rep. Jefferson, but not to DOJ. The order directed the Congressman to submit to the district court, *ex parte*, his claims that specific documents or records were legislative in nature. *Id.* Pending further order from the court, DOJ was enjoined from undertaking any further review of the seized records. JA 421, Pet.App. 76a.

9. DOJ subsequently moved for a modification of the stay, seeking immediate access to those materials which the Congressman had determined were not covered by the privilege. On

November 14, 2006, the D.C. Circuit granted the motion, permitting DOJ to obtain all non-privileged documents for use in its investigation. *See United States v. Rayburn House Office Building*, 497 F.3d 654, 658 (D.C. Cir. 2007), Pet.App. 8a. Of the approximately 47,000 pages of records provided to the Congressman pursuant to the remand order, the Congressman claimed privilege as to approximately 50% of the paper records and 41% of the electronic records. *See* JA 432-98. [4] All records as to which the Congressman did not claim privilege have been provided to DOJ.

10. The appeal of the district court's denial of the motion for return of property addressed the constitutionality of the procedure set forth in the warrant: the unfettered review of all of a Member's records by the executive. But as a result of the procedures implemented by the court of appeals, the Congressman had the opportunity to review the responsive electronic records first, and to separate the legislative ones before the records were produced to DOJ. Thus, in the end, the executive had complete access only to the paper records reviewed during the

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[4] The 15 computer hard drives were searched electronically for all records that contained any one of the approximately 100 search terms in the warrant, whether or not they related to the subject matter of the investigation. Given the number and breadth of the search terms, which included common surnames (*e.g.*, "Jackson" and "Simmons"), it became apparent that the computer search would yield an unmanageable volume of records. Sealed Appendix at 258-63. The search procedures were therefore curtailed, *id.*, but even then the computer search produced over 45,000 pages of electronic records, most of which are unrelated to the matters under investigation.

execution of the search itself. DOJ's brief to the court of appeals acknowledged that in light of the Remand Order and the modification of the stay, the issue presented was a narrow one:

> *[A]s implemented under orders of this Court,* [the search warrant] will result in no Executive Branch official having any further access to the seized materials unless and until Rep. Jefferson determines, or an Article III tribunal has ruled, that the material enjoys no claim of privilege. *Under those circumstances,* the narrow issue presented is whether the incidental review of arguably protected legislative materials during the execution of the search warrant so taints the activity that a constitutional violation must be found and then remedied by the return of *all* documents to Rep. Jefferson . . . .

Brief for the United States, at 15 (emphasis added).

DOJ's statement of the issues also made clear its acceptance of the procedures under the Remand Order. DOJ's brief asserted that the question before the court was whether the search was constitutional where, *inter alia,* "Rep. Jefferson was able to raise document-by-document claims of privilege with the district court, *ex parte,* before the prosecution team (or even a filter team) could review any of the seized materials." Brief for the United States at 3.

DOJ further indicated its understanding that the remand procedures would remain in place:

> In any event, the procedures imposed by this Court are in place, and they will ensure against any further Executive Branch contact with the seized materials unless Rep. Jefferson or a court finds that the documents are unprivileged.

Brief for the United States, at 35.

11. On June 4, 2007, a grand jury in the Eastern District of Virginia returned a 16-count indictment against Rep. Jefferson. Both parties agreed that the return of the indictment did not divest the court of appeals of jurisdiction over the appeal. 497 F.3d at 658, Pet.App. 8a-9a.

12. The court of appeals issued its ruling on August 3, 2007. *United States v. Rayburn House Office Building,* 497 F.3d 654, Pet.App. 1a-39a. In answering the question presented on appeal, the court held that the particular search procedures embodied in the warrant violated the absolute privilege contained in the Clause as it has been interpreted by this Court. The court also relied on the holding in *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), that the testimonial privilege created by the Speech or Debate Clause includes a non-disclosure privilege applicable to legislative documents. 497 F.3d at 660, Pet.App. 11a. The court stated that "the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put," that "[t]he bar on compelled disclosure is absolute," and that "there is no reason to believe that the bar does not apply in the criminal as well as the civil context." 497 F.3d at 660,

Pet.App. 12a-13a. The court found that "[t]he search of Congressman Jefferson's office *must have* resulted in the disclosure of legislative materials to agents of the Executive." 497 F.3d at 661, Pet.App. 13a (emphasis added). Indeed, "[t]he compelled disclosure of legislative materials to FBI agents executing the search warrant was *not unintentional but deliberate* – a means to uncover responsive non-privileged materials." 497 F.3d at 662, Pet.App. 17a (emphasis added).

The court of appeals concluded that "a search that allows agents of the Executive to review privileged materials without the Member's consent violates the Clause." 497 F.3d at 663, Pet.App. 18a. The court found that the search of the paper files carried out at the Congressman's office violated the Clause, but that the copying of computer hard drives had been rendered permissible because "the Remand Order affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive." 497 F.3d at 663, Pet.App. 18a.

13. The court did not attempt to define the procedures to be employed whenever a Congressional office was to be searched. It noted that the practical concerns raised by DOJ about conducting searches after a Member had first been permitted to assert his Speech or Debate privilege could be addressed by appropriate procedures, but left the specifics of such procedures for determination by the legislative and executive branches in the first instance. 497 F.3d at 662-63, Pet.App. 17a-18a.

14. With regard to remedy, the court held that Rep. Jefferson was entitled, as determined in

the first instance by the district court pursuant to the Remand Order, to the return of all privileged documents seized from his Congressional office, but that, "absent any claim of disruption of the congressional office by reason of lack of original versions," there was no basis under Rule 41(g) for ordering the return of non-privileged documents. 497 F.3d at 665, Pet.App. 22a-23a. Because Rep. Jefferson had been indicted, the court noted that its jurisdiction to consider any further reasons for return of the non-privileged documents was doubtful. 497 F.3d at 665, Pet.App. at 23a.

15. Judge Henderson concurred in the court of appeals' judgment: "while I concur in the judgment which affirms the district court's denial of Representative ... Jefferson's ... Rule 41(g) motion, I do not agree with the majority's reasoning and distance myself from much of its dicta." 497 F.3d at 667, Pet.App. 26a.

16. DOJ's petition for rehearing *en banc* was denied by the court of appeals on November 9, 2007. Pet.App. 73a-74a. The mandate issued on December 28, 2007.

17. The remand proceeding is still pending in the United States District Court for the District of Columbia. The criminal trial in the Eastern District of Virginia is currently scheduled to begin on February 25, 2008.[5] DOJ has stated that it "does not

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[5] The defense has filed a motion in the criminal case to suppress all of the material seized from Rep. Jefferson's office, including non-privileged records, on the grounds of the illegality of the underlying search. That motion is currently pending. Because of the possibility of interlocutory appeals on various other issues by either Rep. Jefferson or DOJ, the February 25, 2008 trial date may be postponed.

intend to seek a delay in the hope of securing additional evidence after the district court has completed its review of the Congressman's privilege claims." Petition, at 10-11.

REASONS FOR DENYING THE PETITION

I. The Petition Is Aimed At The Opinion Of The Court Of Appeals, Not Its Judgment, And Seeks An Advisory Opinion On Matters Not Before The Court.

As this Court has made clear, it "reviews judgments, not statements in opinions," *California v. Rooney*, 483 U.S. 307, 311 (1987) (citations omitted), and "do[es] not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us." *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982). In this case, DOJ's petition does not challenge the judgment below, but instead seeks an advisory opinion about matters well outside of the scope of this litigation. Under the circumstances, the petition for a writ of certiorari should be denied.

As outlined above, the court of appeals entered a preliminary remand order that permitted Rep. Jefferson to review the seized documents, identify those that were privileged, and submit his claims of privilege *ex parte* to the district court, to be reviewed *in camera*. JA 421, Pet.App. 75a-76a. The Remand Order enjoined the executive branch from any further examination of the seized documents pending further order of the court. *Id.* The procedures imposed by the Remand Order thus essentially mirrored those that the Congressman

contended were necessary for a constitutionally valid search. In order to ensure that the grand jury investigation could proceed, the court subsequently modified its stay order at DOJ's request, allowing DOJ to obtain all of the documents as to which the Congressman did not claim privilege. 497 F.3d at 658, Pet.App. 8a.

DOJ did not challenge the Remand Order. To the contrary, DOJ's brief to the D.C. Circuit was premised on the existence of the Remand Order. DOJ indicated that it accepted the Remand Order as governing the search warrant. *See* Brief for the United States, at 15. DOJ acknowledged that the Remand Order would remain in place to govern the procedures by which privileged and non-privileged documents would be identified. *See* Brief for the United States, at 35. DOJ also relied on the remand procedures to defend the constitutionality of the search. *See* Brief for the United States, at 3, 15.

The court of appeals incorporated the results of the remand procedure in fashioning the remedy in this case: it found that Rep. Jefferson was entitled to the return of all documents determined by the district court to be privileged, but not to the return of any non-privileged documents. 497 F.3d at 665, Pet.App. 22a-24a.[6] It has always been DOJ's position that its search warrant sought only non-privileged documents. *See, e.g.,* Petition, at 4 (the warrant "did not seek any 'legitimate legislative

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[6] DOJ has now stated that it does not need any documents that it might be able to obtain after the district court's privilege review is complete in order to proceed with Rep. Jefferson's criminal trial. Petition, at 11.

material that would be considered privileged ...'").[7] As a result of the remand procedures, therefore, DOJ has received or will receive all of the non-privileged documents seized from Rep. Jefferson's office. The court of appeals' judgment thus provides the executive with all of the documents it claims it asked for. DOJ will obtain no more evidence if the court of appeals' decision is reversed than it will if the decision stands.

Thus, DOJ has no real quarrel with the judgment entered below. Instead, its challenge is to the court's opinion that the procedures set forth in the warrant did not comport with the Speech or Debate Clause. But this request runs afoul of this Court's clear pronouncement that it "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. at 311 (citations omitted). DOJ should not be granted review of a judgment which it

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[7] While it may be true that DOJ's ultimate objective in the search was to obtain for the prosecution team only non-privileged records, it is not correct to say that the search warrant sought only non-privileged records. The very design of the warrant – using "non-case agents" during the search and a DOJ Filter Team thereafter – reflects DOJ's intention that privileged material was to be reviewed by the executive and seized pursuant to the warrant. As the court of appeals found, "[t]he compelled disclosure of legislative materials to FBI agents executing the search warrant was not unintentional but deliberate – a means to uncover responsive non-privileged materials." 497 F.3d at 662; Pet.App. 17a. The fact that the warrant called for executive branch agents to examine all of the Congressman's records lies at the heart of both Rep. Jefferson's constitutional challenge to the search and the ruling of the court of appeals.

invited and which provides it with what it sought in this case.[8]

DOJ admits in its petition that it does not seek any additional documents for the criminal trial against Rep. Jefferson. Petition, at 10-11. It asserts

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[8] In a footnote, the petition attempts to brush aside the impact of DOJ's acknowledgment in its brief below that the Remand Order would stay in place. *See* Petition, at 23 n.4. DOJ asserts that it made that submission in the expectation that the remand process would be quickly completed. DOJ's brief, however, contained no such qualification. DOJ further notes that it also argued, and the court of appeals reached, the question of the constitutionality of the search procedures in the warrant, and that the court's decision invalidated the filter-team procedures contemplated by the warrant. But this does not negate the fact that DOJ's position below was premised on the existence of the Remand Order, which provided that review of Rep. Jefferson's privilege claims would be conducted by the district court *in camera*. Given its acceptance of that order, DOJ cannot now argue that it is aggrieved because the judgment, which incorporates the remand procedures, does not allow its filter teams to participate in this process.

Even if the executive were entitled to challenge the judgment on the grounds that it denies DOJ the procedural right to have its filter team participate in the privilege review process, this procedural point is not sufficient reason for granting review here. First, the court of appeals' conclusion that judicial review of privilege claims must be conducted *ex parte* is required by the absolute nature of the Speech or Debate privilege. Further, the district court is plainly capable of resolving privilege questions on an *ex parte* basis, and its conclusions are subject to review. In addition, DOJ has already submitted a lengthy memorandum to the district court thoroughly explaining its views regarding the scope of the legislative privilege as applied to Rep. Jefferson's documents in this case. DOJ cannot credibly suggest that the privilege review will not be conducted properly under the procedures imposed by the court of appeals.

that the evidence seized from the Congressional office "remains relevant to the government's ongoing investigation *of others* who may have been involved in criminal activity with Representative Jefferson."[9] Petition at 11 (emphasis added). Thus DOJ has admitted that its concerns in this case are not with Rep. Jefferson or any issues arising out of the motion for return of property that was the basis of this litigation. Instead, the petition's plain focus is on other persons and other matters not before this Court.

The petition describes in detail the perceived impediments to other potential searches of Congressional offices that DOJ may choose to execute in the future under terms that have yet to be devised. The petition is also replete with references to other law enforcement techniques that were either not used or not challenged in this case. The petition attempts to raise an alarm about the viability of "searches of Congressmen's district offices in their home states for documents," about searches of a Member's "homes, vehicles, and briefcases," including searches in "an office of a Member located in his home," about "wiretaps and pen registers directed at Members," and about "conducting voluntary interviews with Hill staffers without the Members' consent." Petition, at 24-25.

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[9] But, for the reasons discussed above, the judgment below provides DOJ with all of the evidence it sought under the warrant in any event, regardless of whether that evidence is relevant to investigations of other participants in Rep. Jefferson's alleged criminal activity.

DOJ's claims that the court of appeals' decision will jeopardize other investigations or the use of other investigative techniques are substantially exaggerated. But even if the Speech or Debate Clause could be implicated in a future investigation, it is obvious that the focus of the instant petition is on persons who are not parties to this case and investigative techniques not at issue here. Like the execution of the search warrant in this case, the legality of such techniques will turn on the specific manner in which they are implemented. These matters were not briefed or argued in the lower courts, and cannot be addressed now. The petition essentially seeks an advisory opinion on the application of the Speech or Debate Clause to matters that are not before this Court at all, let alone ripe for decision. Since this Court does not decide hypothetical issues or give advisory opinions, *Princeton University v. Schmid*, 455 U.S. at 102, the petition should be denied.

II. The Court Of Appeals Correctly Concluded That The Speech Or Debate Clause Prohibits Compelled Disclosure Of Legislative Material To The Executive Branch During The Execution Of A Search.

In its effort to obtain review, the petition mischaracterizes the court of appeals' decision and overstates its impact. Although DOJ claims that the issue in this case is whether the Speech or Debate Clause "bars Executive Branch agents from executing a judicially issued warrant in a Member's office to search for non-legislative records of criminal activity" (Petition, at (I)), neither Rep. Jefferson nor

any of the *amici* ever asserted that all searches of Congressional offices were barred, nor did the court of appeals so hold. Instead, the question on appeal was "whether the procedures under which the search [of Rep. Jefferson's office] was conducted were sufficiently protective of the legislative privilege created by the Speech or Debate Clause." *United States v. Rayburn House Office Building, Room 2113*, 497 F.3d at 655, Pet.App. 1a-2a. The answer reached by the court of appeals was no, because the procedures employed by the executive in this particular search entailed the compelled disclosure of legislative material to executive branch agents, and afforded no opportunity to the Member to shield privileged legislative material from review.

Because the sole question presented by the petition is not raised by the decision below, a grant of certiorari is not warranted. Moreover, certiorari is not necessary in any event because the conclusion actually reached by the court of appeals correctly applies the teachings of this Court regarding the scope and absolute nature of the Speech or Debate privilege.

A. The Non-Disclosure Privilege Is Squarely Grounded In This Court's Speech Or Debate Rulings.

The purpose of the Speech or Debate Clause is "to preserve the independence and thereby the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 524 (1972). It also serves the additional function of reinforcing the separation of powers among the three co-equal branches of government. *Eastland v. United States Servicemen's*

Fund, 421 U.S. 491, 502 (1975). The Clause is not interpreted with a "literalistic approach," *Gravel v. United States*, 408 U.S. 606, 617 (1972), but is read "broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501. Where the Clause applies, it is "absolute," and "balancing plays no part." *Id.* at 509-10.

The founding fathers specifically envisioned the need to provide "practical security" that would shield the legislature against "invasion" by one of the other branches. The Federalist No. 48 (James Madison). "The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." *United States v. Johnson*, 383 U.S. 169, 179 (1966). This Court has interpreted the Clause to protect Members from civil or criminal liability for, or the evidentiary use of, their legislative activities. *See, e.g., Gravel*, 408 U.S. at 615-16; *United States v. Helstoski*, 442 U.S. 477, 487 (1979). The Clause also prevents a Congressman from being questioned about legislative acts and "the motivation for those acts." *Helstoski*, 442 U.S. at 489, quoting *Brewster*, 408 U.S. at 525; *see also Gravel*, 408 U.S. at 615-16. This has been referred to as the "testimonial" prong of the privilege. *See Brown & Williamson*, 62 F.3d at 417.

In *Brown & Williamson*, the D.C. Circuit recognized that the testimonial privilege must apply equally to oral questioning and to efforts to obtain documents:

> We do not accept the proposition that the testimonial immunity of the Speech

> or Debate Clause only applies when Members or their aides are personally questioned. Documentary evidence can certainly be as revealing as oral communications – even if only indirectly when, as here, the documents in question...do not detail specific congressional actions. But indications as to what Congress is looking at provide clues as to what Congress is doing, or might be about to do ....

Brown & Williamson, 62 F.3d at 420. *Brown & Williamson* held that a legislator's right to be free from "questioning" justified congressional refusals to disclose legislative documents – in other words, that the Speech or Debate Clause included a "non-disclosure privilege" with respect to documents. *See United States v. Rayburn House Office Building*, 497 F.3d at 660, Pet.App. 11a.

The court of appeals' decision here applied *Brown & Williamson's* non-disclosure privilege to the circumstances of this case, which involved a team of FBI agents combing through every piece of paper in a Congressman's office. In a finding that has not been challenged by DOJ, the court stated that "The search of Congressman Jefferson's office *must have* resulted in the disclosure of legislative materials to agents of the Executive. Indeed, the application accompanying the warrant contemplated it." 497 F.3d at 661, Pet.App. 13a (emphasis added). The court recognized the patent fact that review of a Member's Congressional documents by executive branch agents pursuant to a search warrant is "compelled," not voluntary, disclosure, and further

that such an invasion falls squarely within the evils the Clause is designed to prevent.

> This compelled disclosure clearly tends to disrupt the legislative process: exchanges between a Member of Congress and the Member's staff or among Members of Congress on legislative matters may legitimately involve frank or embarrassing statements; the possibility of compelled disclosure may therefore chill the exchange of views with respect to legislative activity. This chill runs counter to the Clause's purpose of protecting against disruption of the legislative process.

497 F.3d at 661, Pet.App. 13a-14a. Thus, in order to protect the independent functioning of the legislature and preserve the separation of powers, and in light of the "absolute" nature of the privilege, the Clause *must* protect a Member from the forced disclosure of legislative documents that was contemplated by the warrant here.

The petition asserts that the Speech or Debate Clause does not encompass the non-disclosure privilege recognized in *Brown & Williamson* and applied by the court of appeals. DOJ argues that the Clause is aimed at legislative activities that are generally public in nature and is not a confidentiality privilege. This argument ignores the full scope of the protections afforded by the Speech or Debate Clause.

There is no doubt that the Speech or Debate privilege attaches to public legislative activities – but it is not limited to them. The protection afforded to Members of Congress by the Clause applies to all activities "within the legislative sphere." *Doe v. McMillan*, 412 U.S. 306, 312–313 (1973). Activities fall within that sphere if they are

> "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."

Eastland, 421 U.S. at 501, quoting *Gravel*, 408 U.S. at 625.

Applying that principle, many of the matters that plainly fall within the legislative sphere are *not* public. As this Court has held, the Clause protects legislators from being questioned not only about their legislative acts, but also about "the motivation for those acts." *Helstoski*, 442 U.S. at 489, quoting *Brewster*, 408 U.S. at 525. Legislators' motivations are not necessarily public matters. Similarly, communications with other legislators, communications from constituents, and information gathering in connection with proposed legislation are often not carried out in public, yet are protected legislative activities. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983);

McSurely v. McClellan, 553 F.2d 1277, 1286-87 (D.C. Cir. 1976).

The protection afforded to legislators against being questioned about these matters means that legislators cannot be compelled to disclose the reasons for their legislative acts or communications or information related to legislation. As Judge Silberman pointed out in *Brown & Williamson*, documents can be just as revealing of these matters as oral communications, so the compelled disclosure of documents is the equivalent of compelled oral testimony. Thus, the non-disclosure privilege for legislative documents recognized by the court of appeals is grounded in and required by this Court's Speech or Debate jurisprudence. It is necessary to permit the legislators to deliberate free of interference and disruption.

A finding that the Speech or Debate Clause does not include a non-disclosure privilege would permit exactly what the Clause was designed to prevent: a politically motivated investigation involving the execution of search warrants expressly aimed at legislative documents. While the Speech or Debate Clause would offer protection against the use of legislative documents as evidence – if criminal charges were actually brought against the Member – there would be no protection against the political use of the documents by the executive, nor any safe harbor that would abate the chilling impact on legislative activity. Moreover, if there is no non-disclosure privilege, Members of Congress would have virtually no grounds to resist grand jury subpoenas demanding the production of legislative materials, and they would be defenseless against subpoenas from private parties in civil cases.

B. The Speech Or Debate Clause Applies To Search Warrants.

DOJ attempts to distinguish *Brown & Williamson*, and to differentiate search warrants from subpoenas – thereby excluding search warrants from the ambit of the Speech or Debate Clause – by importing concepts from Fifth Amendment jurisprudence that have no applicability to the legislative privilege. It argues that just as the execution of a search warrant is not considered to involve "testimony" for Fifth Amendment purposes, it also cannot be considered to involve "testimony" for Speech or Debate purposes. But DOJ's attempt to inject Fifth Amendment concepts into the Speech or Debate arena is misguided and unsupported.

The purpose of the Fifth Amendment is to safeguard an individual's freedom and dignity against coercion by the state, *see Miranda v. Arizona*, 384 U.S. 436, 460 (1966), and this Court has established that the contents of documents in a person's possession are not shielded by the Fifth Amendment. *See United States v. Doe*, 465 U.S. 605, 611-12 (1984). But through the act of producing documents in response to a subpoena, an individual makes implicit representations about the existence, authenticity, or subject matter of his records. Accordingly, this Court has held that a request for records, even if it does not call for oral testimony, can have testimonial aspects that implicate the Fifth Amendment privilege. *United States v. Hubbell*, 530 U.S. 27 (2000). Because the execution of a search warrant and the seizure of documents does not call upon the subject of the warrant to say or do anything, the Court has determined that searches in

and of themselves do not trigger Fifth Amendment protections. *See Andresen v. Maryland*, 427 U.S. 463 (1976).

The purpose of the Speech or Debate Clause, by contrast, is to protect the institutional independence and integrity of the legislature and to prevent intrusions into the legislative process. The privilege embraces not only legislative acts but the motivation and intentions behind those acts, *see Brewster,* 408 U.S. at 525, which are reflected, at least in part, in the contents of the records contained within a legislator's files. This is especially true in modern day legislative practice, laden with reports, emails and other documents. The contents of legislative documents lie directly at the heart of the Speech or Debate privilege because the Speech or Debate privilege protects the functioning of the legislature and the legislative process. Compelled disclosure of the contents of legislative documents is at least as intrusive, and has at least as much potential to chill legislative activities and impair the workings of the legislature as oral questioning, because documents reveal as much about what legislators are thinking and doing as responses to questions would. *See Brown & Williamson*, 62 F.3d at 420.

The fallacy of DOJ's position is further exposed by extending its analysis. As noted, even though the Fifth Amendment does not protect the contents of documents, it has been held to protect the "testimony" inherent in the act of producing documents in response to a subpoena. Would DOJ argue that in the subpoena context, a Member may not withhold documents on the grounds that their contents are privileged legislative material, but he

can assert the Speech or Debate Clause if he can identify some communication inherent in the act of production that falls within the privilege?[10] This result is at odds with longstanding practice in responding to subpoenas to Members, including DOJ's own practices.[11]

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[10] It is simply not plausible that this newly-concocted and fundamentally questionable theory represents the full extent of the constitutional protection available to Members under the Speech or Debate Clause in response to demands from the executive for legislative documents. It is difficult, if not impossible, even to hypothesize what legislative information could be conveyed through the mere act of producing records. The purpose of the Clause is to protect substantive legislative acts and thought processes from review, not the narrow range of implicit statements covered by an act of production privilege, *e.g.*, "here are the responsive records that were in my office."

[11] *See* U.S. Attorney's Manual, Title 9, Criminal Resource Manual § 2046:

> In addition, both the House and the Senate consider that the Speech and [sic] Debate Clause gives them an institutional right to refuse requests for information that originate in the Executive or the Judicial Branches that concern the legislative process. ... This applies to grand jury subpoenas, and to requests that seek testimony *as well as documents*. The customary practice when seeking information from the Legislative Branch which is not voluntarily forthcoming from a Senator or Member is to route the request through the Clerk of the House or the Secretary of the Senate....

Available at http//www.usdoj.gov/usao/eousa/foia. reading room/usam/tit9/crm02046.htm. (emphasis added).

Because the critical factor in a Speech or Debate analysis is interference with the legislative process, motivations, and deliberations, Fifth Amendment concepts have no application here. It is appropriate and necessary to treat the compelled disclosure of the contents of documents, whether pursuant to a search warrant or a subpoena, as falling within the "testimonial" prong of the privilege for Speech or Debate purposes.

C. Allowing Executive Agents To Review Legislative Materials During A Search Impairs Legislative Functions.

DOJ further argues that executing a warrant under the original procedures set forth in the warrant is not a sufficient impairment of legislative activities to violate the Clause. But DOJ has long recognized that even the issuance of a subpoena could implicate the privilege. The suggestion that an unannounced raid by a team of agents could somehow be less invasive or less disruptive than a calm exchange of paper through counsel does not comport with reality.

DOJ attempts to ground its argument on this Court's statement in *Gravel* that the Clause extends "beyond pure speech or debate in either House ... 'only when necessary to prevent indirect impairment of such deliberations.'" 408 U.S. at 625 (citation omitted). But the quoted statement was made in the context of defining what constitutes a legislative act, *id.*, not for purposes of determining whether, once it is clear that a matter within the legislative sphere is involved, some intrusions into the privilege protecting that matter may be permissible. This

standard does not govern the question of whether the executive's review of legislative records violated the Clause.

Moreover, DOJ's attempt to minimize the violation of the privilege by denoting it as "incidental" to the search denies the fact that review of Rep. Jefferson's records by executive agents was an essential aspect of the search authorized by the warrant. 497 F.3d at 662, Pet.App. 17a. And as the court of appeals noted, DOJ did not deny "that some impairment of legislative deliberations occurred" as the result of the compelled review of materials in the Congressman's office. 497 F.3d at 661, Pet.App. 14a-15a. DOJ's argument that any chill on legislative activities that may result from the executive's review of legislative materials under the search procedures it adopted for Rep. Jefferson's office is too remote to violate the Clause is undermined by this concession. More fundamentally, the argument fails to take account of this Court's clear directives that the Speech or Debate privilege is "absolute" and "balancing plays no part." *See Eastland*, 421 U.S. at 509-10. Finally, DOJ's reliance on *United States v. Nixon*, 418 U.S. 683 (1974), is misplaced because that case did not involve an absolute privilege spelled out in the Constitution.

D. The Court Of Appeals' Decision Does Not Prevent Searches Of Congressional Offices Or Otherwise Unduly Impede Law Enforcement.

DOJ's claim that the court of appeals' decision will make Congressional offices "a sanctuary for crime" and undermine the separation of powers is

pure hyperbole, exposed by the simple fact that never before in the history of this country has the executive branch deemed a search of a Congressional office to be necessary to achieve the goals of law enforcement. The decision does not bar executive branch agents from conducting a second search of a Congressional office in the future, or require that the Member have sole control of his office during its execution. Instead, the opinion recognizes that the interests of law enforcement can be protected by appropriate procedures – such as "initially sealing the office to be searched before the Member is afforded an opportunity to identify potentially privileged legislative materials" – but appropriately leaves the specifics of such procedures for determination by the legislative and executive branches in the first instance. 497 F.3d at 663, Pet.App. 17a-18a.

DOJ offers a "parade of horribles" that it contends will occur if a Member is allowed to conduct a privilege review of documents in his office prior to a search. But there is no reason why all of these purported concerns could not be resolved by having the privilege review take place under the supervision of executive branch agents, who could control the scene and monitor the process without reviewing the contents of documents.[12]

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[12] DOJ cites the unproven allegation that Rep. Jefferson attempted to conceal a document during a search of his home in New Orleans as "evidence" that such tampering could occur if a search scene were controlled by the Member. Petition, at 20-21. But this disputed claim is based on the observations of an FBI agent who was present at that search – demonstrating that standard search procedures are sufficient to preserve documents at a search scene. Even by DOJ's own description of the scenario, the agent asked for, and immediately received,

DOJ further argues that any procedures that allow the Member to assert his privilege before a search, subject to judicial review, will lead to lengthy delays due to the volume of legislative materials in a Congressional office.[13] But the type of privilege review that may be required under the court of appeals' decision is not unique. First, even under the revised procedures offered by DOJ in the district court, the Congressman would have had the opportunity to raise privilege claims that, if challenged, would have been submitted to the district court. Further, if the executive seeks documents by subpoena, any proceedings to challenge privilege assertions would require judicial review of a volume of documents that could be similar to the volume here. Since the same task would face the reviewing court in either case, any difficulties associated with judicial review cannot be grounds for the claim that the procedures contemplated by the decision are so impracticable that they are not constitutionally required.

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the document. Finally, this argument, grounded in the presumption that Members of Congress are prone to obstruction of justice, is also refuted by the fact that even after the alleged incident at Rep. Jefferson's residence, DOJ did not immediately seek a search warrant for his Congressional office. Instead, DOJ chose to proceed by subpoena. Although DOJ subsequently complained about the results of the subpoena process, those results were the product of issues appropriately raised and decided in separate litigation. *See* Sealed Appendix at 36-99.

[13] As DOJ knows, the timing of the document review process in this case was affected by the pendency of the appeal.

DOJ's argument that its use of other law enforcement techniques in public corruption investigations will be stymied by the court of appeals' decision is also exaggerated. The decision applies only to locations where "legislative materials were inevitably to be found." 497 F.3d at 661, Pet.App. 15a. While it is appropriate that searches of district offices would be subject to the same restrictions as searches of Capitol Hill offices, those rules would not necessarily apply to Members' cars or homes.[14] Further, the non-disclosure privilege would not impede DOJ's ability to conduct voluntary interviews with Hill staffers. The decision below only applies to compelled, not voluntary, disclosures.[15] Moreover, congressional staffers are a legislator's alter ego for Speech or Debate purposes, *see Gravel*, 408 U.S. at 616-17, and are therefore already privileged to decline to reveal legislative material if instructed to do so by the Member. With respect to electronic surveillance, minimization procedures are already required, 18 U.S.C. § 2518(5), and DOJ

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[14] DOJ's assertion that it will no longer carry out searches in a Member's home office in the District of Columbia, Petition at 24, or use wiretaps or pen registers against Members in the District of Columbia, Petition at 25, is a unilateral decision by DOJ that is not mandated by the court of appeals' holding.

[15] The petition notes that while the court of appeals' decision should not apply to voluntary interviews because it addresses only compelled disclosures, "the decision may presage a more expansive application." Petition, at 25. This claim demonstrates the speculative nature of DOJ's concerns.

recognizes that the minimization requirement applies to intercepting privileged communications.[16]

In any event, it has long been recognized that the functions performed by the Speech or Debate Clause in our constitutional framework – preserving legislative independence and the separation of powers – are so important that the privileges provided by the Clause must be protected even if they conflict with the interests of law enforcement. Thus, courts have held that the Speech or Debate privilege may require the dismissal of an indictment, *see United States v. Helstoski*, 635 F.2d 200, 205 (3d Cir. 1980), or the reversal of a conviction. *See United States v. Johnson*, 383 U.S. at 184-85. If these results must be accepted to carry out the purposes of the Clause, then procedures that make evidence-gathering slower or more cumbersome are certainly tolerable.

Because the court below correctly resolved the narrow Speech or Debate issue that was before it, there is no reason to grant certiorari in this case.

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[16] When preparing an affidavit for a Title III application, DOJ attorneys are cautioned that the affidavit "must contain ... standard minimization language *and other language addressing any specific minimization problems (e.g., steps to be taken to avoid the interception of privileged communications* ...)." U.S. Attorney's Manual, Title 9, Criminal Resource Manual § 29(G) (emphasis added), available at http://www.usdoj.gov/usao/eousa/foiareadingroom/usam/title9/crm00029.htm.

III. The Asserted Conflict With The Third Circuit's *Eilberg* Decision Does Not Warrant Review.

DOJ asserts that a conflict between the decision of the D.C. Circuit and the decision of the Third Circuit in *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) ("*Eilberg*"), supports its request for a writ of certiorari. As the petition acknowledges, however, there is no direct conflict between the court of appeals' decision and *Eilberg*, because *Eilberg* did not involve the execution of a search warrant on a Congressional office. Instead, *Eilberg* involved a subpoena served on the Clerk of the House for telephone records. The Third Circuit found that the testimonial aspect of the Speech or Debate Clause was not implicated because neither the Congressman nor his aides had been subpoenaed, and because the government had obtained many of the same records from the telephone company, a non-legislative source. 587 F.2d at 597.

It is true that *Eilberg* rejected the Speech or Debate non-disclosure privilege that was relied on by the court of appeals here. For the reasons set forth above, Rep. Jefferson submits that in that respect, *Eilberg* was wrongly decided.[17] But even if there appears to be a circuit conflict, it cannot overcome

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[17] It also appears that the Third Circuit has backed away from *Eilberg's* blanket rejection of a non-disclosure privilege. *See* Order in *United States v. McDade*, No. 96-1508 (3d Cir. July 12, 1996) (unpublished), at JA 262-63 (where district court had determined that documents were covered by the Speech or Debate privilege, court of appeals stated *Eilberg* "neither required nor authorized disclosure to the government").

the fact that the petition is aimed at the reasoning, not the judgment, of the court below, and further seeks an advisory opinion relating to parties and matters that are not before the Court. This is not a case where further review is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Robert P. Trout
Counsel of Record
Amy Berman Jackson
Gloria B. Solomon
TROUT CACHERIS, PLLC
1350 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036
Phone: (202) 464-3300
Fax: (202) 464-3319

Counsel for Respondent

87

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No. 07-816

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113, WASHINGTON, D.C. 20515

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Grand Jury Investigation into Possible Violations of Title 18, U.S.C., In re, 587 F.2d 589 (3d Cir. 1978) 4

Gravel v. *United States*, 408 U.S. 606 (1972) 10

United States v. *Brewster*, 408 U.S. 501 (1972) 3, 11

United States v. *Gillock*, 445 U.S. 360 (1980) 11

United States v. *Nixon*, 418 U.S. 683 (1974) 11

United States v. *Williams*, 504 U.S. 36 (1992) 6

Constitution and rules:

U.S. Const.:

Art. 1, § 6, Cl. 1 (Speech or Debate Clause) .... *passim*

Amend IV 10

Fed R. Crim. P. 6(e) 10

Sup. Ct. R. 10(a) 4

Miscellaneous:

Letter from Irvin B. Nathan, General Counsel, U.S. House of Representatives, to Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington (Feb. 13, 2008) <http://www.citizensforethics.org/files/021308%20-%20Response%20from%20House%20Counsel.pdf> 9

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The divided court of appeals in this case established an absolute rule against compelled disclosure of Speech or Debate material to the Executive Branch in connection with an ongoing criminal investigation. Representative Jefferson and his amici float some procedural objections to this Court's review but primarily argue that the decision below is correct on the merits. Those contentions are wrong. And most importantly, they do nothing to diminish the urgent need for this Court's guidance. The court of appeals' erroneous and expansive construction of the Speech or Debate Clause is jeopardizing ongoing public corruption investigations by forcing prosecutors to forgo evidence or risk a determination that their investigations were tainted by the use of previously uncontroversial investigative techniques. This Court should grant review to settle the exceptionally important constitutional issues presented and to promote

public confidence in the effective, and timely, enforcement of public corruption laws.

1. a. This case presents a question of extraordinary importance: Whether the Speech or Debate Clause provides a non-disclosure privilege that bars Executive Branch law enforcement agents from executing a search warrant in a Member's office. While Representative Jefferson insists (Br. in Opp. 29-30) that searches would be practical under the court of appeals' decision, he makes no serious effort to refute the detailed showing to the contrary in the petition for a writ of certiorari. As the petition explains (Pet. 19), the court of appeals' decision precludes any Executive Branch law enforcement agents from conducting even a cursory review of documents until after Members have engaged in an ex ante screening of the materials and the courts have determined, in camera and ex parte, that the documents are not privileged. Excluding law enforcement agents from a search directly jeopardizes its law enforcement purpose. Pet. 19-21.

Moreover, requiring courts to review documents for privilege before law enforcement agents could even screen the documents for relevance would produce potentially lengthy delays that would seriously hamper criminal investigations while statutes of limitations were running. Pet. 21-23. In the midst of a criminal investigation, timely access to seized evidence is critical, particularly when the subject of the investigation knows what was searched. Here, the district court has not announced any privilege determinations more than a year and a half after the court of appeals issued its remand order directing the court to do so. The bottom line is that, if the government cannot search a Member's office in the manner authorized by the search warrant here—which included numerous safeguards for the Member's benefit, see Pet. 4-5—the government cannot do

so in any meaningful manner and congressional offices may become "a sanctuary for crime." *United States* v. *Brewster*, 408 U.S. 501, 521 (1972) (citation omitted).

b. Searches of congressional offices are admittedly rare, but because the court of appeals' decision in this case effectively renders congressional offices immune from searches in public corruption probes, it could have a significant impact on criminal behavior on a prospective basis. Moreover, the practical consequences of the court of appeals' decision sweep far beyond office searches. Pet. 23-26. As Representative Jefferson argues (Br. in Opp. 31), the court of appeals' holding applies to the search of any "location where legislative materials were inevitably to be found." Pet. App. 15a; see Pet. 24. The court of appeals' decision therefore chills the use of other vital investigative techniques such as searches of Members' residences, cars, briefcases, and home-district offices, as well as wiretaps, pen registers, and staffer interviews. Pet. 24-25.

While Representative Jefferson denigrates those concerns (Br. in Opp. 31-32), they are real. For example, the government does not presently intend to use wiretaps directed at Members in the District of Columbia—the location where relevant communications are most likely to occur. Pet. 25. Representative Jefferson's response (Br. in Opp. 31-32) that minimization techniques must be used in any event misses the point. Minimization techniques are used to identify non-responsive or privileged communications and to cease surveillance as soon as the communications are identified as being non-responsive or privileged. As the petition explains (Pet. 25), however, even with the use of such techniques, officers typically hear privileged communications before determining that the relevant conversation (or portion of the conversation) is privileged. By replacing traditional mitigation techniques with an absolute

confidentiality privilege, the court of appeals' decision jeopardizes vital, previously uncontroversial investigative techniques.

Representative Jefferson misapprehends (*e.g.*, Br. in Opp. 1, 12) this Court's certiorari criteria in repeatedly arguing that the government's concern with the full consequences of the court of appeals' decision shows that the government is seeking a mere advisory opinion. As discussed below, the petition seeks review of the court of appeals' judgment, and reversal of the court of appeals' decision would have important practical consequences with respect to this very search and the ongoing criminal investigation that led to the search. The fact that the court of appeals' decision also jeopardizes other vital investigative techniques does not suggest that the government seeks a mere advisory opinion; instead, it confirms that the petition presents "an important federal question," Sup. Ct. R. 10(a), that warrants this Court's review.

c. While Representative Jefferson argues (Br. in Opp. 33-34) that this case does not implicate a square circuit split, the court of appeals' decision is in significant tension with the Third Circuit's holding that "the privilege when applied to records or third-party testimony is one of non-evidentiary use, not of non-disclosure." *In re Grand Jury Investigation into Possible Violations of Title 18, U.S.C.*, 587 F.2d 589, 597 (1978) (*Eilberg*). See Pet. 26-28. Indeed, Representative Jefferson acknowledges (Br. in Opp. 33) that "*Eilberg* rejected the Speech or Debate non-disclosure privilege that was relied on by the court of appeals here," and that, under his position, "*Eilberg* was wrongly decided."

In addition, the District of Columbia Circuit's Speech or Debate decisions are uniquely important because virtually every public corruption investigation affecting the Legisla-

tive Branch takes place at least in part in our Nation's capital. Those investigations serve a vital role in protecting the integrity of our democratic government. Following the District of Columbia Circuit's denial of rehearing en banc in this case by a 5-4 vote (with one judge recused), see Pet. App. 73a-74a, only this Court can restore the proper constitutional balance to congressional corruption investigations in the seat of our Nation's government.

Moreover, the government must now weigh the need for evidence against the risk that courts will hold that investigations were tainted by the use of previously uncontroversial investigative techniques. Pet. 25-26. The court of appeals' decision is thus casting an immediate cloud over ongoing congressional corruption investigations. The absence of a more developed conflict of authority in the circuits therefore provides no reason to deny review in this case.

2. In seeking to avoid review, Representative Jefferson attempts various procedural objections to certiorari. Those contentions are directly contradicted by the record and provide no obstacle to review.

a. Representative Jefferson contends (Br. in Opp. 13-15 & n.8, 17) that the government forfeited its challenge by declining to defend the search in the court of appeals, and instead acquiescing in the court of appeals' remand order, which directed the district court to make ex parte, in camera privilege determinations. The government did no such thing. Rather, as the court of appeals explained, the government argued on appeal "that the special procedures described in the warrant affidavit 'are more than sufficient to protect Rep[resentative] Jefferson's rights . . . under the [Speech or Debate] Clause.'" Pet. App. 10a (quoting Gov't C.A. Br. 15-16); see, *e.g.*, Gov't C.A. Br. 15-16, 21. Moreover, the court of appeals squarely rejected that contention. See, *e.g.*, Pet. App. 16a ("The special procedures

outlined in the warrant affidavit would not have avoided the violation of the Speech or Debate Clause because they denied the Congressman any opportunity to identify and assert the privilege before their compelled disclosure to Executive agents."). Claims are properly presented in this Court if they were either pressed *or* passed upon below. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Here, the government's claim was pressed *and* passed upon in the court of appeals.

To be sure, the government *also* argued that, *"[e]ven if* the procedures proposed by the Government were constitutionally insufficient, that would not invalidate the search, which would be fully constitutional under the additional procedures required by this Court's remand order." Gov't C.A. Br. 32 (emphasis added). And the government submitted that the court could reject Representative Jefferson's Speech or Debate claim on the premise that those procedures would remain in place. *Id.* at 15, 35. But that argument hardly forfeited the broader arguments that were both pressed and passed upon—adversely to the government—below. And the months that have elapsed since the court of appeals briefing in which *no* privilege determinations have been made refute the court of appeals' assumption that the remand order provided a "streamlined" solution. Pet. App. 17a.

b. Nor is there merit to Representative Jefferson's contention (Br. in Opp. 12-17) that the petition seeks an advisory opinion because the court of appeals' remand order granted the government all of the relief it sought. To the contrary, the remand order itself severely disadvantages the government and denies it procedural rights that it enjoyed under the district court's judgment.

As explained in the petition for a writ of certiorari (Pet. 21-23 & n.4), the remand order, coupled with Representa-

tive Jefferson's broad claims of privilege, requires the district court to make thousands of ex parte, in camera privilege determinations without the benefit of informed advice from the government, which is in the best position to brief privilege issues in the context of the ongoing criminal investigation. While the government filed a legal memorandum in the district court concerning the general standards applicable to Speech or Debate claims, the government could not provide any analysis of the specific materials and could not dispute Representative Jefferson's ex parte, fact-specific claims. The result is that, a year and a half later, the district court still has not announced *any* privilege determinations concerning *any* of the thousands of documents over which Representative Jefferson has claimed privilege.

Even when the district court eventually makes its determinations, the government may not be able to take a meaningful appeal of any adverse determinations, short of simply asking the court of appeals to review the district court's ex parte, in camera decisions. Similarly, if Representative Jefferson appeals any of the district court's determinations, the court of appeals will likely be thrust into a role similar to that of the district court, considering one-sided, and presumably fact-bound, privilege claims.

Representative Jefferson's assertion (*e.g.*, Br. in Opp. 2) that the remand order permits the government to secure all the documents it seeks is, therefore, wholly unrealistic. In contrast, reversal of the court of appeals' decision would enable the government not only to provide informed adversarial briefing, but also to concede privilege where appropriate and to waive any dispute over documents the government considers irrelevant, duplicative, or otherwise not essential—thereby narrowing the lower courts' daunting task and expediting this considerably delayed investigation.

c. While he does not dispute that this case presents a live controversy for this Court's review, Representative Jefferson suggests (Br. in Opp. 15-16) that certiorari is not warranted because the resolution of this dispute will have no practical effect on the government's investigation. Because the search warrant proceedings have already engendered significant delay, the government will not seek further delay of Representative Jefferson's trial in hopes of receiving further documents from the search. Pet. 10-11. But two weeks ago, on February 20, 2008, Representative Jefferson filed an interlocutory appeal in the Fourth Circuit from the trial court's denial of his motion to dismiss the indictment. Notice of Appeal, *United States* v. *Jefferson*, No. 1:07-cr-00209 (E.D. Va.). Thus, at this point, there may be time for the government to receive further documents before Representative Jefferson's trial.[1]

In any event, as explained in the petition for a writ of certiorari (Pet. 10-11), the seized evidence is relevant to the government's ongoing investigation of other participants in Representative Jefferson's numerous alleged bribery schemes. The search warrant affidavit established probable cause to believe that Representative Jefferson was but one participant in several bribery schemes involving a vari-

[1] Representative Jefferson is arguing on appeal that "material protected by * * * the Speech or Debate Clause * * * was [improperly] presented to the grand jury." Notice of Appeal at 1, *Jefferson*, *supra* (No. 1:07-cr-00209). In the government's view, Representative Jefferson's appeal lacks merit. If Representative Jefferson were to prevail on appeal, however, the government would have an interest in securing additional, non-privileged evidence from the search of his office for purposes of a new indictment. The Fourth Circuit appeal provides no basis for denying review in this case because, even if the government prevails, the Fourth Circuit can do nothing about the District of Columbia Circuit's erroneous decision in this case and its practical impact on criminal investigations in the seat of our Nation's government.

ety of other participants, and that evidence of that criminal activity would be found in Representative Jefferson's congressional office. See C.A. App. 11-75. Thus, this dispute between the government and the congressional office of Representative Jefferson will remain live even after the conclusion of the criminal trial of Representative Jefferson himself.

3. There is no reason to postpone review, as amici suggest, in the hopes of an inter-Branch compromise. Discussions for that purpose began almost two years ago, at the direct behest of the President (C.A. App. 249-250) and House leadership (Amici Br. Add. B at 4a). Those discussions have not been productive, however, in part because of the court of appeals' decision. Counsel for the House of Representatives has asserted that the court of appeals' recognition of a non-disclosure privilege follows "well-established precedents" and that any other view of the Clause would "radically shrink" or "effectively gut" the Clause's protections.[2] As a result, this Court's review of the court of appeals' decision would not *interfere* with ongoing negotiations; it would instead clarify their starting point. If the court of appeals' decision is flawed, as the government believes, reversal would correct House Counsel's contrary view and facilitate a more realistic compromise.

4. The bulk of Representative Jefferson's response focuses on the merits. That discussion underscores that the important constitutional question presented is squarely joined by the parties and warrants review by this Court.

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[2] Letter from Irvin B. Nathan, General Counsel, U.S. House of Representatives, to Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington 4 (Feb. 13, 2008) <http://www.citizensforethics.org/files/021308%20-%20Response%20from%20House%20Counsel.pdf>; see Amici Br. 11.

Indeed, Representative Jefferson's brief makes clear that he seeks an expansion of the Speech or Debate Clause that neither this Court nor any other court of appeals has ever sanctioned. He does not seek protection against prosecution for legislative acts, the use of legislative acts against him, or compelled testimony about legislative acts. Instead, he broadly asserts (Br. in Opp. 20) that the Speech or Debate Clause also contains an absolute confidentiality component.

As explained in the petition (Pet. 17), the absolute nondisclosure protection sought by Congressman Jefferson and granted by the court of appeals far exceeds the textual scope of the Clause, which is limited to "Speech or Debate in either House." U.S. Const. Art. I, § 6, Cl. 1. While this Court has construed the Clause more broadly than its text would suggest "when *necessary* to prevent indirect impairment of [legislative] deliberations," *Gravel* v. *United States*, 408 U.S. 606, 625 (1972) (emphasis added; citation omitted); see Pet. 13-14, there is no such necessity here. The Executive seeks only unprivileged evidence of criminal conduct, and it would come into only cursory contact with any privileged materials in the course of searching for unprivileged ones. Pet. 17-18.

Representative Jefferson asserts (Br. in Opp. 23) that a broad "non-disclosure privilege" is needed to protect legislators from "politically motivated investigation[s]." There are, however, numerous other safeguards that protect against that remote risk. A neutral magistrate must issue a search warrant (or wiretap authorization) upon a finding of probable cause. The Fourth Amendment's reasonableness requirement further ensures that any warrant will be executed in a reasonable manner. See U.S. Const. Amend. IV. Rule 6(e) of the Federal Rules of Criminal Procedure also prohibits the government from disclosing matters oc-

curring before a grand jury. In this case, moreover, the warrant expressly called for filter teams with no other role in the investigation to sort responsive unprivileged materials from other materials, and to provide only the responsive unprivileged materials to the prosecution team. Pet. App. 4a-5a. The warrant further prohibited disclosure by the filter team of "any politically sensitive items inadvertently seen." C.A. App. 80. And, as this Court has explained, "[t]he Legislative Branch is not without [political] weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members." *Brewster*, 408 U.S. at 522-523 n.16.

Representative Jefferson's contention (Br. in Opp. 21) that his position is nonetheless necessary to prevent a chilling effect on deliberations is refuted by this Court's rejection of similar arguments advanced by the President of the United States, see *United States* v. *Nixon*, 418 U.S. 683, 712 (1974), and state legislators, see *United States* v. *Gillock*, 445 U.S. 360 (1980) (citing *Nixon*, *supra*). See Pet. 18. While the Speech or Debate Clause is absolute *where it applies*, the very issue at stake in this case is its scope. The court of appeals has greatly expanded its scope beyond what has been recognized in the past and what can be justified. Its decision divided the panel, ultimately split the court of appeals 5-4 (with one judge recused) on the government's petition for rehearing en banc, and now calls out for this Court's review.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

GREGORY G. GARRE*
Acting Solicitor General

MARCH 2008

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* The Solicitor General is recused from this case.

84

No. 07-816

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

RAYBURN HOUSE OFFICE BUILDING, ROOM 2113,
WASHINGTON, D.C. 20515,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENT

SCOTT B. PALMER
173 South Evanslawn Ave.
Aurora, IL 60506
(630) 897-8956
pro se

ELLIOT S. BERKE
4625 North 2nd Rd.
Arlington, VA 22203
(703) 892-5976
pro se

[Additional *pro se amici curiae* listed on inside cover]

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional pro se amici curiae:

WILLIAM H. CABLE
100 River Dr.
Annapolis, MD 21403
(410) 267-6621

THEODORE VAN DER MEID
2914 North 1st Rd.
Arlington, VA 22201
(703) 524-7536

PHILIP GEORGE KIKO
3500 Arlington Blvd.
Arlington, VA 22204
(703) 553-0131

REID STUNTZ
3708 Fort Worth Ave.
Alexandria, VA 22304
(703) 212-7251

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES....ii

INTEREST OF *AMICI CURIAE*....1

SUMMARY OF ARGUMENT....4

BACKGROUND AND INTRODUCTION....6

ARGUMENT....9

I. Review Would be Premature As The Political Branches Are In The Process Of Addressing The Very Issue Raised By The Petition....9

II. The Department Seeks An Advisory Opinion From The Court And The Instant Case Does Not Present Issues That Are Sufficiently Developed For Consideration By The Court....12

III. There Is No Live Conflict Among The Circuits And The Court Of Appeals Correctly Determined That The Speech Or Debate Clause Bars The Discovery Of Legislative Records....17

CONCLUSION....21

ADDENDUM A....1a

ADDENDUM B....4a

TABLE OF AUTHORITIES

CASES **Page**

Alabama v. Shelton,
535 U.S. 654 (2002)
(Scalia, J., dissenting).....13

Alabama State Fed'n of Labor v. McAdory,
325 U.S. 450 (1945).....12

Ashwander v. Tennessee Valley Auth.,
297 U.S. 288 (1936)
(Brandeis, J., concurring).....13

Brown & Williamson Tobacco Corp. v. Williams,
62 F.3d 408 (D.C. Cir. 1995).....8, 20

Doe v. McMillan, 412 U.S. 306 (1973).....18-19

Flast v. Cohen, 392 U.S. 83 (1968).....12, 13

Gravel v. United States,
408 U.S. 606 (1972).....18, 19, 20

In re Grand Jury,
821 F.2d 946 (3d Cir. 1987).....18

In re Grand Jury Investigation,
587 F.2d 589
(3d Cir. 1978) ("*Eilberg*").....18

Kilbourn v. Thompson,
103 U.S. 168 (1880).....19

North Carolina v. Rice,
404 U.S. 244 (1971) (per curiam).....12, 15

Preiser v. Newkirk, 422 U.S. 395 (1975).....12

Steffel v. Thompson, 415 U.S. 452 (1974).....13

Three Affiliated Tribes v. Wold Eng'g, P.C.,
467 U.S. 138 (1984).....13

U.S. Nat'l. Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993).....12

United States v. Brewster,
408 U.S. 501 (1972).....20

United States v. Fruehauf,
365 U.S. 146 (1961).....12-13

United States v. Johnson,
383 U.S. 169 (1966).....19

United States v. Rayburn House Office Bldg., Room 2113, No 06-3105,
Order (D.C. Cir. July 28, 2006).....7

United States v. Sharpe,
470 U.S. 675 (1985)
(Stevens, J., dissenting).....17

CONSTITUTIONAL PROVISIONS

U.S. Const., art. I, § 6, cl. 1.....1

MISCELLANEOUS

Charles Alan Wright & Mary Kay Kane,
Law of Federal Courts
(6th ed. 2002).....12

Hearing on Oversight of the Dep't of Justice Before the H. Comm. on the Judiciary,
110h Cong. (Feb. 7, 2008)
(transcript) (forthcoming).....9-11

Joint Statement of Speaker Hastert
and Leader Pelosi (May 25, 2006).....11

Letter from Irvin B. Nathan, General Counsel, U.S. House of Representatives, to Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington (Feb. 13, 2008), *available at* http://www.citizensforethics.org/files/021308%20%20Response%20from%20House%20Counsel.pdf.....11

INTEREST OF AMICI CURIAE[1]

The decision below centers on the Speech or Debate Clause of the Constitution: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." U.S. Const., art. I, § 6, cl. 1. This Clause – which applies to all activities within the "legislative sphere" and, among other things, privileges Members absolutely from having to disclose legislative materials – is a fundamental pillar of Congress's independence and is critically important to its relationship with the other branches of government. This case arises out of the Department of Justice's ("Justice Department" or "Department") historically unprecedented search and seizure of paper and electronic records – including a substantial quantity of legislative records – from the Capitol Hill office of Louisiana Congressman William J. Jefferson in May 2006. The Congressman had no opportunity to review and set aside – prior to the search and subject to later judicial review – records that were arguably or unquestionably legislative.

Amici curiae Scott B. Palmer, Theodore Van Der Meid, Elliot S. Berke, William H. Cable, Philip George Kiko, and Reid Stuntz are former senior congressional staffers who, combined, have more than 100 years of experience in the legislative branch. Given their former capacities as high-ranking congressional staffers – and in two cases also as high-ranking officials in the

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* has made a monetary contribution to the preparation or submission of this brief.

executive branch – *amici* have a very profound understanding of the importance of the Speech or Debate Clause and its fundamental place in the Constitution's separation of powers.

Mr. Palmer served as Chief of Staff to the then-Speaker of the U.S. House of Representatives ("House"), J. Dennis Hastert, from 1999-2007. He also served as Congressman Hastert's Chief of Staff from 1987-99. During that time, from 1995-99, Mr. Palmer was also Deputy Chief of Staff to the House Majority Whip.

Mr. Van Der Meid also served on the staff of former Speaker Hastert, as Counsel and Director of Floor Operations from 1999-2007. Prior to that, he was Staff Director and Chief Counsel to the House Committee on Standards of Official Conduct from 1995-99. Mr. Van Der Meid also served for nearly six years as General Counsel to then-Republican Leader Robert Michel.

Mr. Berke served as Counsel to then-Speaker Hastert for most of 2006. For two years prior to that, he served as General Counsel to the House Majority Leader. From 1998-99 and 1997-98, respectively, he was Counsel to the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, and Investigative Counsel to the House Committee on Government Reform and Oversight.

Mr. Cable served as Chief of Staff to House Majority Leader and former House Minority Whip Steny H. Hoyer from 2006-07 and 2005-06, respectively. He also served as Administrative Counsel for the House Chief Administrative Officer from 2004-05 and Democratic Staff Director for the Committee on House Administration from 2002-03. Mr. Cable also served

as Staff Director and Counsel to the Committee on House Administration from 1976-77 and Counsel for the House Committee on Education and Labor from 1967-76. From 1977-81 he served as Deputy Assistant to the President of the United States.

Mr. Kiko's most recent House appointment was from January through April 2, 2007, when he served as counsel to Congressman F. James Sensenbrenner, Jr. From 2001-07, he served as Chief of Staff and General Counsel to the House Judiciary Committee. Prior to that, from 1999-2001, he served as Chief of Staff and Counsel to Congressman Sensenbrenner. From 1997-99, he served as Deputy Chief of Staff and Counsel to the House Committee on Science, and from 1995-97, he served as Associate Administrator for Procurement and Purchasing in the Office of the Chief Administrative Officer of the House. From 1987-95, he served in various capacities at the Department of the Interior: Legislative Counsel, Director of Budget and Program Resource Management, and Deputy Director in the Office of Hearings and Appeals. Mr. Kiko also served from 1986-87 as Acting Director of the Policy Enforcement Service Office for Civil Rights in the Department of Education. From 1983-86, he served as Minority Associate Counsel to the House Judiciary Committee. And, from 1979-83, he served as Executive Assistant and Legislative Director to Congressman Sensenbrenner.

Mr. Stuntz served for 18 years with the House Committee on Energy and Commerce (known from 1995-2002 as the Committee on Commerce). During that time, he was Counsel and then Staff Director/Chief Counsel to the Subcommittee on Oversight and Investigations (1988-91; 1991-95), and from 1995-97 and 1997-2006, he was Minority General Counsel

and then Minority Staff Director/Chief Counsel, respectively, for the full Committee.

Amici – four of whom also appeared as *amici* in the court of appeals – do *not* file this brief to protect Congressman Jefferson; to suggest that he or any other Member of Congress is above the law or immune from prosecution; or to suggest that no search warrant can ever be executed on a congressional office. They do, however, have a very great interest in ensuring that, in reconciling the Speech or Debate Clause with the Department's legitimate interests in investigating and prosecuting legislators who may have engaged in criminal activities, the Clause is construed and applied in a manner that preserves the independence of the legislative branch essential to our system of checks and balances.

SUMMARY OF ARGUMENT

Amici oppose the Justice Department's petition because Supreme Court review of the question presented is premature, inappropriate, and unwarranted. The question presented is what procedures the executive branch should follow in any possible *future* searches of congressional offices in light of the Speech or Debate Clause of the Constitution. Review is *premature* because, as prescribed by the court of appeals, the House and the Department are currently negotiating in good faith over procedures and protocols that will reconcile the Speech or Debate Clause with the Department's legitimate law enforcement interests. Both the Attorney General and the Speaker of the House have made clear publicly that such an approach is preferable to judicial intervention, and thus it is clear that this Court's review in this case would

frustrate efforts that are best left to the political branches in the first instance.

Review is *inappropriate* because the petition seeks an advisory opinion, which is particularly improvident where a constitutional question involving the separation of powers between the two political branches is presented. While the Justice Department's petition ostensibly concerns its efforts to obtain access to documents seized from Congressman Jefferson's office – as to which the Congressman has asserted privilege – the petition makes clear that the Department seeks to use this opportunity to obtain an advisory opinion on a host of issues unrelated to the assertedly privileged documents. Nearly the entire petition seeks resolution of issues regarding myriad other forms and locations of searches – wiretapping and pen registers, searches in vehicles, homes, and out-of-town offices – that have no bearing whatsoever on this case. Any opinion addressing those issues would be advisory and therefore impermissible.

Review is *unwarranted* not only because the court of appeals' decision was correctly decided but also because there is no conflict between it and any Supreme Court precedent or with another circuit court opinion. Indeed, there could not be any conflict because there has never before in our country's 225-year history been a search of a congressional office by the executive branch. Recognizing this fact, the petition attempts to recast the issue presented at an extraordinarily high level of generality; namely whether the Speech or Debate Clause applies to the discovery of documents. But even under the Department's expansive view of the question presented, it identifies only *one* decision from *one* other circuit, the Third Circuit, allegedly in conflict with the decision below. More-

over, the Third Circuit not only has retreated from its circumscribed view of the Clause, it also has not applied that particular view in over 20 years. In any event, even assuming, *arguendo*, that a live conflict exists, the court of appeals correctly decided this case. Its decision was squarely in line both with its own and this Court's precedents. Those prior decisions have made clear that the Speech or Debate Clause is to be interpreted broadly and with regard to its fundamental purpose in the constitutional scheme. Those prescriptions can lead only to the conclusion that the privilege encompasses legislative records.

BACKGROUND AND INTRODUCTION

In May 2006, the Federal Bureau of Investigation ("FBI") executed a search warrant on Congressman Jefferson's office in the Rayburn House Office Building. The FBI seized two boxes of paper records and imaged or copied all of the office's computer hard drives, as well as two USB memory sticks. This was the first such warrant to be executed on a congressional office since the Constitution's adoption. *See* App. 11a.

Congressman Jefferson moved in the U.S. District Court for the District of Columbia for the return of his records, principally on the ground that the search violated his rights under the Speech or Debate Clause. This challenge was rejected by the district court, however, because, *inter alia*, the Congressman "was not made to say or do anything," and thus "the Speech or Debate Clause's testimonial privilege was not triggered by the execution of the search warrant." App. 55a-56a.

The Congressman appealed and then moved for a stay pending appeal. The D.C. Circuit granted that

motion and enjoined the Department from resuming its review of the materials seized. *United States v. Rayburn House Office Bldg., Room 2113*, No 06-3105, Order at 1 (D.C. Cir. July 28, 2006) (hereinafter "Remand Order"). The Remand Order outlined the procedures by which the district court should determine what information, if any, was privileged. Specifically, the district court was instructed to copy all of the documents – physical and electronic[2] – seized by the Justice Department and to give the Congressman an opportunity to submit a list, *ex parte*, of any documents over which he claims privilege. *Id.* The district court was then tasked with assessing, *in camera*, whether or not those claims were valid. *Id.* The district court is in the midst of this review. Pet. at 22.

None of these proceedings, however, hampered the Department in its investigation of Congressman Jefferson. On June 4, 2007, less than three weeks after oral argument was heard in the D.C. Circuit, the grand jury returned a 16-count indictment against the Congressman in the Eastern District of Virginia. App. 8a. As the petition notes, the Congressman's trial is scheduled to commence later this month[3] as "the government does not intend to seek a delay in the hope of securing additional evidence after the district court has completed its review." Pet. at 10-11.

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[2] The district court was instructed to apply a series of search terms selected from the warrant to the electronic files in order to generate a list of responsive records that could be forwarded and reviewed by Congressman Jefferson.

[3] Due to the possibility of interlocutory appeals on motions submitted by the defense, the trial may be postponed until after February 25, 2008, the current trial date.

Two months after the grand jury's indictment, the D.C. Circuit reversed the district court's decision. The court of appeals held that "[t]he Executive's search of the Congressman's paper files . . . violated the [Speech or Debate] Clause," although "its copying of computer hard drives and other electronic media is constitutionally permissible because the Remand Order affords the Congressman an opportunity to assert the privilege prior to disclosure of privileged materials to the Executive." App. 18a.

The court of appeals acknowledged that *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), which held that the Speech or Debate Clause "includes a non-disclosure privilege," is controlling. App. 11a. The court reaffirmed that "a key purpose of the privilege is to prevent intrusions in the legislative process and that the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put." *Id.* at 12a. The court further explained that Congressman Jefferson did not suggest "that he was entitled to prior notice of the search warrant before its execution," or "that his assertions of privilege could not be judicially reviewed." *Id.* at 15a-16a. Rather, the Congressman merely asserted "that the warrant procedures *in this case* were flawed because they afforded him no opportunity to assert the privilege before the Executive scoured his records." *Id.* at 16a (emphasis added).

The court of appeals concluded that there was "no reason why the Congressman's privilege . . . cannot be asserted at the outset of a search [of his office] in a manner that also protects the interests of the Executive in law enforcement." *Id.* at 17a. It noted that its Remand Order "illustrates a streamlined approach by

narrowing the number of materials the district court may be required to review." *Id.* The court added, however, that any accommodation regarding how the executive branch will conduct future searches of Member's offices, if any, "is best determined by the legislative and executive branches in the first instance." *Id.* at 18a. This process is now underway.

ARGUMENT

I. Review Would Be Premature As The Political Branches Are In The Process Of Addressing The Very Issue Raised By The Petition.

The Court should deny the Justice Department's petition because it seeks resolution of an issue – the procedures by which the executive branch may execute a search warrant for the office of a sitting Member of Congress – that is the subject of active, ongoing, and good faith negotiations between the political branches. Prudence counsels that the Court avoid entreaties for resolution of this complex issue before the coordinate branches have had a full opportunity to reach a mutually acceptable accommodation.

The Attorney General shares this view. In recent testimony before the House Judiciary Committee concerning searches of congressional offices, the Attorney General had the following exchange on the subject with Committee Member Howard Berman:

> **Mr. Berman.** [Does] your desire for cooperation between the Justice Department and the Congress . . . apply to jointly developing mutually agreeable procedures to govern any future search warrants executed on congressional offices in such a way as to protect legitimate law enforcement needs, while also respecting the

speech or debate clause of the Constitution and the separation of powers?

Attorney General Mukasey. I think I can say it emphatically includes that. Because I believe there are ongoing discussions to resolve precisely that. There is a case that was brought, as you know. We petitioned for cert, I believe. We would much prefer to resolve that case in the way that most disputes with respect to privilege and other matters are resolved between Congress and the Justice Department, namely by conversation and accommodation. And, as I understand it, that's actively underway.

Mr. Berman. . . . . [A]re you saying that the Justice Department is actively engaged and committed to working to develop such a mutually agreeable process?

Attorney General Mukasey. Both of those. And I deeply hope that it comes out that way, rather than in some bright-line ruling that one of us can't live with or would find it awkward to live with.

Mr. Berman. Great. And then, finally, if there is such an agreement, would you support setting forth that agreement in a memorandum of understanding or legislation or in some other fashion?

Attorney General Mukasey. I think precisely how that – what the terms of the agreement are will govern, to a certain extent, how it's to be set forth. I'm, at this point, more concerned that we reach agreement. Once we reach agreement, I think we can figure out precisely

> how to set it forth, whether it has to be in a memorandum of understanding or in some other fashion. But I certainly favor the success of the conversations that I understand to be now ongoing.

Hearing on Oversight of the Dep't of Justice Before the H. Comm. on the Judiciary, 110th Cong. 27-29 (Feb. 7, 2008) (transcript) (forthcoming), Add. A at 1a-3a.

The House leadership also subscribes to this view. A few days after the search warrant was executed on Congressman Jefferson's office, then-Speaker J. Dennis Hastert and then-Democratic Leader and now-Speaker Nancy Pelosi directed the House Office of General Counsel to "begin negotiations with the Department of Justice regarding the protocols and procedures to be followed in connection with evidence of criminal conduct that might exist in the offices of Members." Joint Statement of Speaker Hastert and Leader Pelosi (May 25, 2006), Add. B at 4a; *see also* Letter from Irvin B. Nathan, General Counsel, U.S. House of Representatives, to Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington at 3-4 (Feb. 13, 2008), *available at* http://www.citizensforethics.org/files/021308%20-%20Response%20from%20House%20Counsel.pdf.

Thus, with both the head of the Justice Department and the Speaker of the House fully committed to these discussions, it would be premature for the Court to weigh in on this acute political question at this time. The court of appeals itself recognized the importance of judicial self-restraint during this process. *See* App.18a (noting that the procedures by which agents of the executive branch are permitted to

search a Member's congressional office are "best determined by the legislative and executive branches in the first instance").

II. The Department Seeks An Advisory Opinion From The Court And The Instant Case Does Not Present Issues That Are Sufficiently Developed For Consideration By The Court.

"It has long been [the Court's] considered practice not to decide abstract, hypothetical or contingent questions . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . ." *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945). Indeed, "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 65-66 (6th ed. 2002). This is so because "'[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy.'" *U.S. Nat'l. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)); *see also Flast v. Cohen*, 392 U.S. 83, 97 (1968). The Supreme Court is thus not empowered to decide abstract propositions, or to declare, for application in *future* cases, principles or rules of law which are not aimed at resolving the matter at hand. *See North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam). "Its judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Preiser*, 422 U.S. at 401 (quoting *Rice*, 404 U.S. at 246). Suits must be "pressed before the Court with

that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). Moreover, "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

The rule against advisory opinions has particular force when disputes involve questions of constitutional dimensions. *See Alabama v. Shelton*, 535 U.S. 654, 676 (2002) (Scalia, J., dissenting) (noting the Court's "longstanding refusal to issue advisory opinions, particularly with respect to constitutional questions" (citation omitted)); *see also Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them."); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Moreover, "[w]hen the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned to them by Article III." *Flast*, 392 U.S. at 96.

The petition unquestionably seeks an advisory opinion, and its focus is not on obtaining the documents at issue, but rather on numerous other *hypothetical* questions. It ignores the limited nature of the holding below, which was specific to the issue of the

search of a Member's office and did not address the tangential issues of electronic searches or searches in places other than a Member's office. Moreover, the petition does not offer any argument as to why the documents at issue – those seized from the Congressman's office on Capitol Hill which the Congressman contends are privileged – are relevant to the pending Jefferson trial or any current investigation of Congressman Jefferson.

The bulk of the petition focuses on three hypothetical scenarios that the Department asserts are implicated by the D.C. Circuit's decision: (1) the lower court's decision "impede[s] searches of Members' homes, vehicles, or briefcases," Pet. at 12; (2) the decision below has deleterious consequences for future use of "wiretaps and pen registers directed at Members," *id.*; and (3) evidence obtained from Members of Congress in the future may be altered or destroyed as a result of the procedures recommended by the court of appeals in response to a claim of privilege under the Speech or Debate Clause, *id.* at 20. None of these wholly hypothetical scenarios, however, is at issue.

It is uncontested that the seizure in this case did not involve documents in a Member's home, vehicle, or briefcase. Nor did it involve documents in Congressman Jefferson's district office in Louisiana. It is thus of no moment that "in the District of Columbia, for example, the Department will no longer search for documents in an office of a Member located *in his home* because of concerns that a search could (under the court of appeals' decision) taint an investigation." *Id.* at 24 (emphasis added).

This case also does not concern "wiretaps and pen registers directed at Members." *Id.* at 24. Again, the fact that, as a result of the decision below, the Department is now allegedly limiting its "inten[tions] to use wiretaps against Members in the District of Columbia," *id.* at 25, has no bearing on *this case*. The documents at issue were not obtained with wiretaps or pen registers, nor was either method addressed by the court of appeals.

The Department asserts, in some detail, that, when executing a search warrant, it must have total control of the situation and that it cannot, under any circumstances, abdicate any part of that function. *Id.* at 19-23. Such control, however, is also not at issue in this case. The Department long ago seized all of the information in question – *i.e.*, it clearly exercised "'unquestioned command of the situation.'" *Id.* at 20 (citation omitted). There is no live concern that "[i]f a Member or his aides were to screen documents in the first instance, the evidentiary value of the search would be jeopardized," or that "[t]he Member might add fingerprints to evidence" or "rearrange documents." *Id.* Thus, insofar as the Department is concerned with the execution of *this* search warrant, there is no "'real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Rice*, 404 U.S. at 246 (citation omitted).

Further, it is telling that the petition initially indicates – but does not follow through on – its endeavor to "explain[how] the evidence seized in Representative Jefferson's office remains relevant to the government's ongoing investigation of others who may have been involved in criminal activity with Representative

Jefferson." Pet. at 11. This failure merely confirms – along with the fact that the Department is moving full steam ahead with its prosecution of Congressman Jefferson – that its petition addresses issues other than those presented by this case.

In perhaps its lone attempt to tether its petition to the actual facts of this case, the Department argues that despite the lower court's statement that "the Congressman's privilege under the Speech or Debate clause" could be "asserted at the outset of a search in a manner that also protects the interests of the Executive in law enforcement," App. 17a, "the court offered no explanation of *how* that assertion could be made, either constitutionally or practically," Pet. at 19. This characterization, however, is not only incorrect, but any purported need for clarification only serves to demonstrate further why granting the petition would merely yield an advisory opinion.

First, the court below very clearly outlined the procedures necessary to effectuate its ruling. As the petition itself acknowledges, Congressman Jefferson has already fully complied with the court of appeals' mandate to "submit to the District Court . . . any claims that specific documents or records are legislative in nature," App. 76a, and the district court's *in camera* review is underway. *See* Pet. at 22.

Second, the reason the court of appeals did not set out procedures beyond its Remand Order – and precisely the reason why a decision by this Court would be an advisory opinion – is that any further ruling was not necessary to the disposition *of this case*. Because the Department had *already searched and seized* the materials in question, the role of the court of appeals was to determine *only* what retroactive

procedures were most appropriate to remedy the Department's constitutional violation – not to set out procedures to govern potential searches in the future. As the court of appeals noted, that is exactly what the political branches should work out "in the first instance." *See* App. 18a.

At bottom, each of the above concerns expressed by the petition is a function of the Department's view that "the decision may *presage* a more expansive application" than mere "'compelled disclosure.'" Pet. at 25 (emphasis added). Such an application, however, has not yet occurred. And while we recognize that denial of the petition "would not serve the interest of providing additional guidance to the law enforcement community," "regarding that interest as paramount would support the wholesale adoption of a practice of rendering advisory opinions at the request of the Executive – a practice the Court abjured at the beginning of our history." *United States v. Sharpe*, 470 U.S. 675, 726 (1985) (Stevens, J., dissenting). The Court has instead wisely "opted for a policy of judicial restraint – of studiously avoiding the unnecessary adjudication of constitutional questions." *Id.* at 727.

III. There Is No Live Conflict Among The Circuits And The Court Of Appeals Correctly Determined That The Speech Or Debate Clause Bars The Discovery Of Legislative Records.

Two additional factors demonstrate why review here is inappropriate. *First*, despite the Department's suggestion to the contrary, *see* Pet. at 26, there simply is no live conflict among the circuits that warrants review. The Department *does not cite to a single case* beyond this one that involves the execution of a search warrant on the office of a sitting Member of

Congress. No court of appeals has addressed this issue prior to the decision of the court below.

Without a single like case on which to rely, the Department thus attempts to drum up a conflict by looking at a much broader principle of law: whether the Speech or Debate Clause bars discovery of legislative records. Even in this regard, the Department cites only one 30-year old case in the Third Circuit that is allegedly in conflict with the D.C. Circuit. *See id.* (citing *In re Grand Jury Investigation*, 587 F.2d 589 (3d Cir. 1978) ("*Eilberg*")). *Eilberg*, however, lends little or no support to the Department's suggestion that a conflict exists. It involves a unique and easily distinguishable set of facts,[4] has been viewed equivocally by later decisions in the Third Circuit,[5] and has not been employed in that circuit in over 20 years.

Second, the decision below was clearly correct. It is in line with well-established precedents of this Court that the Speech or Debate Clause broadly "prohibits inquiry into . . . legislative acts." *Gravel v. United States*, 408 U.S. 606, 616 (1972); *see also Doe*

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[4] *Eilberg* concerned an appeal from a denial of a motion to quash a grand jury subpoena, issued to the Clerk of the House, which sought telephone records of then-Congressman Joshua Eilberg. The Third Circuit found the testimonial (*i.e.*, nondisclosure) aspect of the privilege not implicated only because neither the Congressman nor his aides had been subpoenaed, and because the telephone company possessed duplicates of the phone records sought. *Eilberg*, 587 F.2d at 597.

[5] The Third Circuit has pulled back from its original statement in *Eilberg*, more recently noting that "[o]ur precedents have *suggested* that the privilege is *primarily* one of non-evidentiary use, not one of non-disclosure." *In re Grand Jury*, 821 F.2d 946, 953 n.4 (3d Cir. 1987) (emphasis added).

v. McMillan, 412 U.S. 306, 312 (1973). The Department, on the other hand, asks the Court to confine the application of the privilege in an extraordinarily narrow fashion. According to the Department, the Clause should only apply when a Member is "question[ed]" or asked to testify about a non-confidential or "public" action. Pet. at 15-16. This exceedingly literalistic construction of the Clause is inconsistent with this Court's precedents and the policy underlying the Clause.

The Court has long made clear that the Speech or Debate Clause is to be construed broadly, not narrowly. For example, in *Gravel*, the Court extended the protections afforded under the Clause beyond the Members of Congress themselves to their aides. *Gravel*, 408 U.S. at 616. In doing so, the Court acknowledged that "[i]t is true that the Clause itself mentions only 'Senators and Representatives,'" but it asserted that "prior cases have plainly not taken a literalistic approach in applying the privilege." *Id.*; *see also id.* ("The Clause also speaks only of 'Speech or Debate,' but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view."). Likewise, in *United States v. Johnson*, 383 U.S. 169 (1966), the Court explained that "the privilege should be read broadly, to include not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it.'" *Id.* at 179 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880)).

With this in mind, it is plain that legislative documents fall within the Clause's ambit. It is self-evident that the work of today's Congress is document

intensive. Legislative work is no longer relegated to floor speeches as it may have been in seventeenth century England, and the lower courts have properly construed the Clause to take account of that fact. *See United States v. Brewster*, 408 U.S. 501, 525 (1972) (asserting generally that "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process"). As Judge Silberman explained in *Brown & Williamson,* "[d]ocumentary evidence can certainly be as revealing as oral communications," and that "indications as to what Congress is looking at provide clues as to what Congress is doing, or might be about to do – and this is true whether or not the documents are sought for the purpose of inquiring into (or frustrating) legislative conduct or to advance some other goals." 62 F.3d at 420. And, moreover, if "the touchstone [of the Clause] is interference with legislative activities," it follows that "the nature of the use to which documents will be put – testimonial or evidentiary – is immaterial." *Id.* at 421.

It is thus plain that legislative documents are protected by the Speech or Debate Clause. This Court has explained that "[t]he Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation *without intimidation or threats from the Executive Branch.*" *Gravel*, 408 U.S. at 616 (emphasis added). As discussed above, in order to meet this aim, all legislative acts, not just those conducted in public and about which a Member is orally questioned, must be protected. This is exactly what the court of appeals recognized and is also why certiorari is unwarranted.

CONCLUSION

For the reasons set forth herein, *amici* respectfully urge the Court to deny the petition for certiorari.

Respectfully submitted,

SCOTT B. PALMER
173 South Evanslawn Ave.
Aurora, IL 60506
(630) 897-8956

THEODORE VAN DER MEID
2914 North 1st Rd.
Arlington, VA 22201
(703) 524-7536

ELLIOT S. BERKE
4625 North 2nd Rd.
Arlington, VA 22203
(703) 892-5976

WILLIAM H. CABLE
100 River Drive
Annapolis, MD 21403
(410) 267-6621

PHILIP GEORGE KIKO
3500 Arlington Blvd.
Arlington, VA 22204
(703) 553-0131

REID STUNTZ
3708 Fort Worth Ave.
Alexandria, VA 22304
(703) 212-7251

Amici Curiae for the Respondent

February 19, 2008

ADDENDUM

Addendum A

Hearing on Oversight of the Department of Justice
Thursday, February 7, 2008
House of Representatives,
Committee on the Judiciary
Washington, D.C.

Mr. Berman. I would like to go to another subject.

You have stated, I believe several times, both in your confirmation process and since, of your desire for cooperation between the Justice Department and the Congress.

Mr. Berman. My question is, does that cooperation apply to jointly developing mutually agreeable procedures to govern any future search warrants executed on congressional offices in such a way as to protect legitimate law enforcement needs, while also respecting the speech or debate clause of the Constitution and the separation of powers?

Attorney General Mukasey. I think I can say it emphatically includes that. Because I believe there are ongoing discussions to resolve precisely that. There is a case that was brought, as you know. We petitioned for cert, I believe. We would much prefer to resolve that case in the way that most disputes with respect to privilege and other matters are resolved between Congress and the Justice Department, namely by conversation and accommodation.

And, as I understand it, that is actively underway.

Mr. Berman. You are right, I believe and that this is part of a recent meeting between the House Office of General Counsel and the Justice Department.

I guess, are you saying that the Justice Department is actively engaged and committed to working to develop such a mutually agreeable process?

Attorney General Mukasey. Both of those.

And I deeply hope that it comes out that way, rather than in some bright-line ruling that one of us can't live with or would find it awkward to live with.

Mr. Berman. Great.

And then, finally, if there is such an agreement, would you support setting forth that agreement in a memorandum of understanding or legislation or in some other fashion?

Attorney General Mukasey. I think precisely how that what the terms of the agreement are will govern, to a certain extent, how it will be set forth.

I am, at this point, more concerned that we reach agreement. Once we reach agreement, I think we can figure out precisely how to set it forth, whether it has to be in a memorandum of understanding or in some other fashion.

But, I certainly favor the success of the conversations that I understand to be now ongoing.

Mr. Berman. Well, thank you. I think you have covered that subject. And I appreciate your responses.

. . .

Addendum B

J. Dennis Hastert
Fourteenth District
Illinois

http://www.speaker.gov

Speaker's Press Office
United States House of Representatives
Washington, DC 20515

FOR IMMEDIATE RELEASE:
May 25, 2006

CONTACT: 202-225-2800
Ron Bonjean or Heidi Armstrong

Joint Statement from Speaker Hastert and Leader Pelosi

(Washington, D.C.) Speaker of the House J. Dennis Hastert (R-IL) and Democratic Leader Nancy Pelosi (D-CA) today issued the following statement:

"Today, we are directing the House Counsel to begin negotiations with the Department of Justice regarding the protocols and procedures to be followed in connection with evidence of criminal conduct that might exist in the offices of Members."

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